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C.U.P.E. *v.* Ontario (Minister of Labour), [2003] 1 S.C.R. 539, 2003 SCC 29

Minister of Labour for Ontario *Appellant*

v.

Canadian Union of Public Employees

and Service Employees International Union *Respondents*

and

Canadian Bar Association and

National Academy of Arbitrators (Canadian Region) *Interveners*

Indexed as: C.U.P.E. *v.* Ontario (Minister of Labour)

Neutral citation: 2003 SCC 29.

File No.: 28396.

2002: October 8; 2003: May 16.

Present: McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel and Deschamps JJ.

on appeal from the court of appeal for ontario

Labour relations — Hospital labour disputes — Appointment of board of arbitration — Legislation requiring disputes over collective agreements in hospitals and nursing homes to be resolved by compulsory arbitration — Minister of Labour appointing retired judges to chair arbitration boards — Whether Minister required to select arbitrators qualified by expertise and acceptance in labour relations community — Whether retired judges, as a class, biased against labour — Hospital Labour Disputes Arbitration Act, R.S.O. 1990, c. H.14, s. 6(5).

Administrative law — Judicial review — Appointment of board of arbitration — Legislation requiring disputes over collective agreements in hospitals and nursing homes to be resolved by compulsory arbitration — Minister of Labour appointing retired judges to chair arbitration boards — Whether appointment process for selecting chairs of arbitration boards violates natural justice or infringes institutional independence and impartiality of arbitration boards — Whether appointment process breached legitimate expectations of unions — Whether appointments caused reasonable apprehension of bias — Whether Minister disqualified or required to delegate task of making appointments because of interest in arbitrations — Whether Minister's appointments patently unreasonable — Hospital Labour Disputes Arbitration Act, R.S.O. 1990, c. H.14, s. 6(5).

Since 1965, Ontario's hospitals, nursing homes and their employees have been required to resolve disputes over collective agreements by compulsory arbitration under the *Hospital Labour Disputes Arbitration Act* ("*HLDAA*"). If the parties cannot agree on a mutually acceptable arbitrator, a panel of three members is struck, two designated by the parties and the third chosen by the two designates or, if they fail to agree, appointed by the Minister of Labour. Amendments to the *Labour Relations Act* in 1979 facilitated the formation and use of a list of arbitrators with expertise acceptable to both management and the unions. A similar register of arbitrators was dropped from the *HLDAA* in 1980 but a normal practice was for senior officials of the Ministry of Labour, under delegated authority, to identify appropriate arbitrators. Following the 1995 provincial election, a reorganization of public sector institutions, including schools and hospitals, led to Bill 136. The Bill contained the proposed *Public Sector Dispute Resolution Act, 1997* which included a Dispute Resolution Commission. Organized labour opposed many aspects of the Bill, including the proposed commission. When the Minister announced a return to the sector-based system of appointing arbitrators, the unions believed the selection of *HLDAA* chairpersons would thereafter be limited to mutually agreed candidates.

In early 1998, the Minister appointed four retired judges to chair several arbitration boards. They were not appointed by mutual agreement nor were they on the "agreed" list compiled under s. 49 (10) of the *Labour Relations Act, 1995*. The unions were not consulted. The President of the Ontario

Federation of Labour complained to the Minister that the understanding about a return to the *status quo* had been breached without consultation. The unions objected that retired judges lack expertise, experience, tenure and independence from government. They also complained the Minister had breached procedural fairness by not delegating the task of making appointments to senior officials. The four judges initially appointed declined to act but other retired judges accepted the appointments. The unions sought declarations that the Minister's actions denied natural justice and lacked institutional independence and impartiality. The Divisional Court dismissed the application for judicial review. The Court of Appeal allowed the unions' appeal, concluding that the Minister had created a reasonable apprehension of bias and interfered with the independence and impartiality of the arbitrators, as well as defeating the legitimate expectation of the unions contrary to the requirements of natural justice. The Minister was ordered not to make any further appointments "unless such appointments are made from the long-standing and established roster of experienced labour relations arbitrators" compiled under s. 49 (10) of the *Labour Relations Act, 1995*.

Held (McLachlin C.J. and Major and Bastarache JJ. dissenting): The appeal should be dismissed for reasons that differ somewhat from those of the Court of Appeal. The Minister is required, in the exercise of his power of appointment under s. 6(5) of the *HLDAA*, to be satisfied that prospective chairpersons are not only independent and impartial but possess appropriate labour relations expertise and are recognized in the labour relations community as generally acceptable to both management and labour.

Per Gonthier, Iacobucci, Binnie, Arbour, LeBel and Deschamps JJ.: The Minister, as a matter of law, was required to exercise his power of appointment in a manner consistent with the purpose and objects of the statute that conferred the power. A fundamental purpose and object of the *HLDAA* was to provide an adequate substitute for strikes and lock-outs. To achieve the statutory purpose, as the Minister himself wrote on February 2, 1998, "the parties must perceive the system as neutral and credible". This view was fully supported by the *HLDAA*'s legislative history.

The Minister was not required to proceed with the selection of chairpersons by way of "mutual agreement" or from the s. 49(10) roster. Nor were retired judges as a "class" reasonably seen as biased against labour. Nevertheless, the Minister was required by the *HLDAA*, properly interpreted, to select arbitrators from candidates who were qualified not only by their impartiality, but by their expertise and general acceptance in the labour relations community.

Section 6(5) of the *HLDAA* contemplates the appointment of "a person who is, in the opinion of the Minister, qualified to act". The Minister's discretion is constrained by the scheme and object of the Act as a whole, which is to create a "neutral and credible" substitute for the right to strike and lock-out. Labour arbitration has traditionally rested on a consensual basis, with the arbitrator chosen by the parties or being acceptable to both parties. Although the s. 6(5) power is expressed in broad terms, the Minister is nevertheless required, in the exercise of that power, to have regard to relevant labour relations expertise, independence, impartiality and general acceptability within the labour relations community. These criteria are neither vague nor uncertain. The livelihood of a significant group of professional labour arbitrators depends on their recognized ability to fulfill them.

The result is a perfectly manageable framework within which the legislature intended to give the Minister broad but not unlimited scope within which to make appointments in furtherance of the *HLDAA*'s object and purposes. The Minister, under the *HLDAA*, is not given a broad policy function. His narrow role is simply to substitute for the parties in naming a third arbitrator in case of their disagreement and, given the context, background and purpose of the Act, his rejection of labour relations expertise and general acceptability as relevant factors was patently unreasonable.

Although, as a member of Cabinet, the Minister was committed to public sector rationalization and had a perceived interest in the appointment process and the outcome of the arbitrations, the legislature specifically conferred the power of appointment on the Minister and, absent a constitutional challenge, clear and unequivocal statutory language conferring that authority prevailed over the common law rule against bias. The Minister's power to delegate the appointment process under s. 9.2(1) of the *HLDAA* was permissive only and to take away his authority to make his own choice would amount to a judicial amendment of the legislation.

The Minister satisfied any duty to consult with the unions about the change in the appointments process. There were extensive meetings during which the Minister signalled that the process was subject to reform and that retired judges were potential candidates for appointments. The unions made clear their opposition. Section 6(5) of the *HLDAA* did not impose on the Minister a procedural requirement to consult with the parties to each arbitration nor does the evidence establish a firm practice of appointing from a list or by mutual agreement. A general, ambiguous promise to continue an existing system subject to reform does not suffice under the doctrine of legitimate expectation to bind the Minister's exercise of his or her discretion.

The Court of Appeal had concluded that the Minister's approach tainted both the independence and impartiality of the *HLDAA* arbitration boards to which the retired judges had been appointed. This conclusion was not justified. The *HLDAA* commands the use of *ad hoc* arbitration boards. Such boards are not characterized by financial security or security of tenure beyond the life of the arbitration itself. The independence of arbitrators is guaranteed by training, experience and mutual acceptability. Since s. 6(5) requires the appointment of individuals qualified by training, experience and mutual acceptability, the proper exercise of the appointment power would lead to a tribunal which would satisfy reasonable concerns about institutional independence.

Impartiality raises different considerations. The Court of Appeal did not suggest that the retired judges were in fact biased or partial but concluded that they might reasonably be seen to be "inimical to the interests of labour, at least in the eyes of the appellants". The test, however, is not directed to the subjective perspective of one of the parties but to the reasonable, detached and informed observer. Retired judges as a class have no greater interest than other citizens in the outcome of the arbitrations and there are no substantial grounds to think they would do the bidding of the Minister or favour employers so as to improve the prospect of future appointments. A fully informed, reasonable

person would not stigmatize retired judges, as a class, with an anti-labour bias. Allegations of individual bias must be dealt with on a case-by-case basis.

The appropriate standard of review is patent unreasonableness. The pragmatic and functional approach applies to the judicial review of the exercise of a ministerial discretion and factors such as the existence of a privative clause, the Minister's expertise in labour relations, the nature of the question before the Minister and the wording of s. 6(5) all call for considerable deference. A patently unreasonable appointment is one whose defect is immediate, obvious and so flawed in terms of implementing the legislative intent that no amount of curial deference can justify letting it stand.

The appointments were not patently unreasonable simply because the Minister did not restrict himself to the s. 49(10) list of arbitrators. Some arbitrators on the list were unacceptable to the unions and some acceptable arbitrators were not on the list, confirming the reasonableness of the Minister's view that candidates could qualify without being on the list. However, in assessing whether the appointments were patently unreasonable, the courts are entitled to have regard to the importance of the factors the Minister altogether excluded from his consideration. In this case, the Minister expressly excluded relevant factors that went to the heart of the legislative scheme. The matters before the boards required the familiarity and expertise of a labour arbitrator. Expertise and neutrality foster general acceptability. Appointment of an inexpert and inexperienced chairperson who is not seen as generally acceptable in the labour relations community is a defect in approach that is both immediate and obvious. Having regard to the legislative intent manifested in the *HLDAA*, the Minister's approach to the s. 6(5) appointments was patently unreasonable. The qualifications of specific appointees will have to be assessed on a case-by-case basis if challenged.

The appeal is thus dismissed on the limited ground that appointments that excluded from consideration labour relations expertise and general acceptability in the labour relations community were patently unreasonable.

Per McLachlin C.J. and Major and Bastarache JJ. (dissenting): The appropriate standard of review for the exercise of the Minister's appointment power under s. 6(5) of the *HLDAA* is patent unreasonableness. The pragmatic and functional approach focusses on the particular provision being invoked. The Minister exercised power under a single statute, his enabling legislation, and, absent a constitutional challenge, the patent unreasonableness standard need not make room for a review of statutory interpretation of enabling legislation on a correctness basis. There is no basis for dividing the Minister's decision into component questions subject to different standards of review, nor should the Minister's power be viewed as due less deference because it is circumscribed by legislation. Not every administrative action involves a distinct and identifiable exercise of statutory interpretation. Where, as here, the factors indicate that the question raised by the provision is one intended by the legislators to be left to the exclusive decision of the administrative decision maker, it simply is not one for the courts to make. The presence of a privative clause is compelling evidence that deference is due. The Minister

knows more about labour relations than the courts and will be taken to have expertise. Deference is owed to expert decision makers designated by the legislature. The fact-based nature of the question before the Minister also points to deference and empowering the Minister, rather than an apolitical actor, suggests a legislative intent of political accountability.

The Minister did not make appointments that were patently unreasonable. A contextual approach to statutory interpretation of the enabling legislation is necessary for determining the criteria relevant to exercise of the discretion. In some cases, the criteria are spelled out in the legislation, regulations or guidelines or found in the specific purposes of the relevant Act. In others, the relevant factors may be unwritten and derived from the purpose and context of the statute. In this case, there are no relevant regulations, guidelines, or other instruments, and the statute does not say much. The Act stipulates that appointees must be qualified in the opinion of the Minister, expressly contemplating the importance of the Minister's opinion. Labour relations expertise, independence and impartiality, reflected in broad acceptability, are not necessarily dominant or obvious factors and should not be imposed as specific restrictions on the Minister's discretion. The Minister developed an opinion and determined that judging experience was a relevant qualification. The Act called for the Minister to reach his own opinion, not to consider a specific determining factor. Given how much work it takes to identify labour relations experience and broad acceptability as factors and to imply them into s. 6(5), weighing them less heavily than another unwritten qualification, namely judicial experience, does not vitiate the appointments as patently unreasonable. It takes significant searching or testing to find the alleged defect or even the factors said to constrain the Minister. It is therefore difficult to characterize the appointments as immediately or obviously defective, not in accordance with reason, clearly irrational, or so flawed that no amount of curial deference could justify letting them stand based on a failure to consider these factors. Recognition of the seriousness of quashing a decision as patently unreasonable is crucial to maintaining the discipline of judicial restraint and deference, and our intervention is not warranted in these circumstances.

Concerns about institutional independence and institutional impartiality do not render the Minister's appointments patently unreasonable. The Act requires that the tribunals be *ad hoc* and retired judges as a class cannot reasonably be seen as so partial that appointing them took the Minister outside the bounds of his statutory discretion. The possibility of a successful challenge to a particular board is not foreclosed but the constraints on the Minister's discretion do not permit a general inquiry into the independence and impartiality of the boards on the basis of the appointment process in the absence of a direct challenge to the boards actually appointed.

Cases Cited

By Binnie J.

Applied: *Roncarelli v. Duplessis*, [1959] S.C.R. 121; *Padfield v. Minister of Agriculture, Fisheries and Food*, [1968] A.C. 997; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048; *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157; **distinguished:** *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, [2001] 2 S.C.R. 281, 2001 SCC 41; *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, 2002 SCC 11; **referred to:** *Air Canada v. British Columbia (Attorney General)*, [1986] 2 S.C.R. 539; *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 S.C.R. 781, 2001 SCC 52; *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R 311; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2; *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313; *MacBain v. Lederman*, [1985] 1 F.C. 856; *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3; *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869; *Brosseau v. Alberta Securities Commission*, [1989] 1 S.C.R. 301; *McMaster University and McMaster University Faculty Assn., Re* (1990), 13 L.A.C. (4th) 199; *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643; *Council of Civil Service Unions v. Minister for the Civil Service*, [1985] A.C. 374; *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525; *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170; *In re Preston*, [1985] A.C. 835; *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890; *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982; *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19; *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20; *Oakwood Development Ltd. v. Rural Municipality of St. François Xavier*, [1985] 2 S.C.R. 164; *Reference re Bill 30, an Act to amend the Education Act (Ont.)*, [1987] 1 S.C.R. 1148; *Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Association*, [1975] 1 S.C.R. 382; *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227; *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324; *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282; *R. v. Généreux*, [1992] 1 S.C.R. 259; *Valente v. The Queen*, [1985] 2 S.C.R. 673; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3; *Katz v. Vancouver Stock Exchange*, [1996] 3 S.C.R. 405; *2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919; *R. v. Lippé*, [1991] 2 S.C.R. 114; *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484; *R. v. Williams*, [1998] 1 S.C.R. 1128; *R. v. Parks* (1993), 15 O.R. (3d) 324, leave to appeal refused, [1994] 1 S.C.R. x; *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369; *St-Jean v. Mercier*, [2002] 1 S.C.R. 491, 2002 SCC 15.

By Bastarache J. (dissenting)

Pushpanathan v. Canada (Minister of Citizenship and Immigration), [1998] 1 S.C.R. 982; *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157; *Padfield v. Minister of Agriculture, Fisheries and Food*, [1968] A.C. 997; *Roncarelli v. Duplessis*, [1959] S.C.R. 121; *Toronto Catholic District School Board v. Ontario English Catholic Teachers' Assn. (Toronto Elementary Unit)* (2001), 55 O.R. (3d) 737, leave to appeal refused, [2002] 2 S.C.R. ix; *Domtar Inc. v.*

Quebec (Commission d'appel en matière de lésions professionnelles), [1993] 2 S.C.R. 756; *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324; *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227; *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748; *Ivanhoe inc. v. UFCW, Local 500*, [2001] 2 S.C.R. 566, 2001 SCC 47; *Ajax (Town) v. CAW, Local 222*, [2000] 1 S.C.R. 538, 2000 SCC 23; *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1; *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, [2001] 2 S.C.R. 281, 2001 SCC 41; *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557; *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722; *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, 2002 SCC 11; *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *R. v. Advance Cutting & Coring Ltd.*, [2001] 3 S.C.R. 209, 2001 SCC 70; *Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)*, [1997] 1 S.C.R. 12; *Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941; *Canadian Union of Public Employees, Local 301 v. Montreal (City)*, [1997] 1 S.C.R. 793; *Katz v. Vancouver Stock Exchange*, [1996] 3 S.C.R. 405; *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3.

Statutes and Regulations Cited

Back to School Act (Toronto and Windsor) 2001, S.O. 2001, c. 1, s. 11(4), (5).

Hospital Labour Disputes Arbitration Act, R.S.O. 1990, c. H.14, ss. 4, 5(1), 6(5), (12), 7, 9.2(1), 11(1).

Labour Relations Act, R.S.O. 1960, c. 202.

Labour Relations Act, R.S.O. 1970, c. 232 [am. 1979, c. 32, s. 1].

Labour Relations Act, 1995, S.O. 1995, c. 1, Sch. A, s. 49(10).

Teachers' Collective Bargaining Act, R.S.N. 1990, c. T-3, ss. 17(2), 22(2).

Teachers' Collective Bargaining Act, R.S.N.S. 1989, c. 460, s. 26(2).

Telecommunications Act, S.C. 1993, c. 38, s. 64(1).

Universities Act, R.S.A. 2000, c. U-3, s. 32(*e*).

Authors Cited

Brown, Donald J. M., and John M. Evans. *Judicial Review of Administrative Action in Canada*. Toronto: Canvasback, 1998 (loose-leaf updated August 2002).

de Smith, Stanley A. *Constitutional and Administrative Law*, 4th ed. By Harry Street and Rodney Brazier. Harmondsworth, Eng.: Penguin Books, 1981.

Driedger, Elmer A. *Construction of Statutes*, 2nd ed. Toronto: Butterworths, 1983.

Dyzenhaus, David. "The Politics of Deference: Judicial Review and Democracy", in Michael Taggart, ed., *The Province of Administrative Law*. Oxford: Hart Publishing, 1997, 279.

Ontario. Department of Labour, Research Branch. "The Impact of the Ontario Hospital Labour Disputes Arbitration Act, 1965: A Statistical Analysis", report prepared by Keith McLeod, November 1970.

Ontario. Legislative Assembly. *Official Report of Debates*, No. 218, 1st Sess., 36th Parl., August 25, 1997, pp. 11462, 11464.

Ontario. Legislative Assembly. *Official Report of Debates*, No. R-69, Standing Committee on Resources Development, September 23, 1997, p. R-2577.

Ontario. *Legislature of Ontario Debates*, No. 35, 3rd Sess., 27th Leg., March 3, 1965, p. 935.

Ontario. *Legislature of Ontario Debates*, No. 53, 3rd Sess., 27th Leg., March 22, 1965, p. 1497.

Ontario. *Legislature of Ontario Debates*, No. 134, 2nd Sess., 29th Leg., December 14, 1972, p. 5760.

Ontario. *Royal Commission Report on Compulsory Arbitration in Disputes Affecting Hospitals and Their Employees*. Toronto: The Commission, 1964.

Pépin, Gilles, et Yves Ouellette. *Principes de contentieux administratif*, 2e éd. Cowansville, Qué.: Yvon Blais, 1982.

APPEAL from a judgment of the Ontario Court of Appeal (2000), 51 O.R. (3d) 417, 194 D.L.R. (4th) 265, 138 O.A.C. 256, 26 Admin. L.R. (3d) 55, 5 C.C.E.L. (3d) 8, [2000] O.J. No. 4361 (QL), allowing an appeal from a judgment of the Divisional Court (1999), 117 O.A.C. 340, [1999] O.J. No. 358 (QL). Appeal dismissed, McLachlin C.J. and Major and Bastarache JJ. dissenting.

Leslie McIntosh, for the appellant.

Howard Goldblatt, *Steven Barrett* and *Vanessa Payne*, for the respondents.

J. Gregory Richards, *Jeff G. Cowan* and *Susan Philpott*, for the intervener the Canadian Bar Association.

Michel G. Picher and *Barbara A. McIsaac*, *Q.C.*, for the intervener the National Academy of Arbitrators (Canadian Region).

The reasons of McLachlin C.J. and Major and Bastarche JJ. were delivered by

1 BASTARACHE J. (dissenting) — I adopt Binnie J.'s recital of the facts and judicial history. In my view, however, the Minister of Labour ("Minister") did not make appointments that were patently unreasonable. In reaching that decision, I would adopt a somewhat different approach to that of Binnie J. with regard to judicial review for abuse of discretion. I also object to Binnie J.'s conclusion that the impartiality and independence of boards can be challenged on the sole basis of the appointment process without any direct attack on a board actually constituted.

2 With regard to judicial review for abuse of discretion, as I shall explain, the balance of factors in this case militates unambiguously for the patent unreasonableness standard of review. This deferential standard applies fully to each appointment. In reviewing discretionary appointments, I think it unhelpful and inappropriate, under the pragmatic and functional approach, to separate the Minister's interpretation of the scope of his power under s. 6(5) of the *Hospital Labour Disputes Arbitration Act*, R.S.O. 1990, c. H.14 ("*HLDAA*"), from the ultimate appointments. Instead, what that approach requires is to assess the entire discretionary decision against the standard of patent unreasonableness.

3 Moreover, the constraints on the exercise of the Minister's discretion do not permit a general inquiry into the independence and impartiality of the boards on the basis of the appointment process in the absence of a direct challenge to the independence or impartiality of boards actually appointed. The respondents' attack on the institutional independence or impartiality of the boards must be levied against a particular board. This attack is not appropriately an argument as to whether the Minister abused his discretion.

4 I do, however, accept Binnie J.'s analysis and conclusion that the Minister satisfied his duty of procedural fairness.

I. What is the Standard of Review for the Appointment Power?

5 I do not share Binnie J.'s appreciation of the potential confusion in determining, as separate exercises, the content of the duty of procedural fairness and the standard of review. Both exercises examine the context of an administrative decision. The same factor may be salient for both exercises. Nevertheless, the two inquiries proceed separately and serve different objectives. The content of the duty of procedural fairness seeks to ensure the appropriate relationship between the citizen and the administrative decision maker. In contrast, the standard of review speaks to the relationship between the administrative decision maker and the judiciary. In the former case, there is no need to determine a degree of deference.

6 Binnie J. and I agree ultimately on the appropriate standard of review. This agreement masks, however, some disagreement on the pragmatic and functional approach adopted by this Court.

7 As this Court recognized in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, at para. 28, this approach focusses on "the particular, individual provision being invoked and interpreted by the tribunal". The result is that some provisions within the same statute may require greater deference than others, depending on the factors. It does not follow, however, that exercise of a discretionary power under a single provision, such as s. 6(5) in this appeal, should be viewed as "the product of a number of issues or determinations" (Binnie J.'s reasons, at para. 97) with the decision maker's statutory interpretation singled out for closer scrutiny. Binnie J.'s citations to this Court's decision in *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157 ("*CBC*"), support the impression that a single administrative decision contains within it parts that are independently reviewable on a more or, more likely, less deferential standard. That appeal related to the standard of review for an agency's decision that required it to interpret a statute other than its enabling legislation. The passage from the plurality, to which Binnie J. refers, concludes that where the standard of review for a decision as a whole is patent unreasonableness, the correctness of the interpretation of an external statute may nevertheless affect the overall reasonableness of that decision. That authority is not apparently relevant to a case such as the present appeal, where the Minister exercises a power under a single statute, his enabling legislation. Given the present context, reference to that authority can only suggest, wrongly, that even in these circumstances a patent unreasonableness standard must make room, within the broader decision, for review of statutory interpretation on a correctness basis. The obvious exception, where a legal question will take a different standard from the global decision, is when an agency's decision engages constitutional issues. Constitutional questions will necessarily be reviewable on a correctness standard. Special cases like *CBC* will be dealt with on a case-by-case basis. In this case, however, the main issue is that of deciding whether the Minister failed to consider proper factors when making appointments under s. 6(5). It is a single issue.

8 It is true that some enabling statutes distinguish between the agency's factual and legal determinations. Such statutes may contemplate an appeal from the agency's legal determinations while protecting, with a privative clause, findings of fact. See e.g. *Telecommunications Act*, S.C. 1993, c. 38, s. 64(1). Yet, where there is no basis for dividing a decision into component questions — here the privative clause in s. 7 of the *HLDAA* expressly shields the entire appointment —, the single appropriate standard of review, and the deference it dictates, apply to all aspects of the decision. There is no basis for the view that an expert decision maker given due deference with regard to a discretionary appointment power is due less deference because the power is circumscribed by legislation, the suggestion being that there is a statutory interpretation aspect to his or her decision. The authorities that Binnie J. cites for the self-evident proposition that a discretion is never untrammelled and that "there is always a perspective within which a statute is intended to operate" (*Roncarelli v. Duplessis*, [1959] S.C.R. 121, at p. 140; *Padfield v. Minister of Agriculture, Fisheries and Food*, [1968] A.C. 997 (H.L.)) do not indicate that each administrative action necessarily involves a distinct and identifiable exercise of statutory interpretation.

9 Indeed, it is worth recalling the basis on which the *CBC* case that Binnie J. cites, *supra*, discusses the standard for an agency's interpretation of an external statute. The key factor in the analysis in that case was the Canada Labour Relations Board's expertise. The concern was that the Board did not have expertise respecting the interpretation of the external statute. What was lacking was expertise as experience, the kind that a board acquires from applying a statute repeatedly over time. The nature of this expertise as experience is made clear by Iacobucci J.'s caveat: "I would leave open the possibility that, in cases where the external statute is linked to the tribunal's mandate and is frequently encountered by it, a measure of deference may be appropriate" (*CBC*, *supra*, at para. 48; see also *Toronto Catholic District School Board v. Ontario English Catholic Teachers' Assn. (Toronto Elementary Unit)* (2001), 55 O.R. (3d) 737 (C.A.), leave to appeal refused June 20, 2002, [2002] 2 S.C.R. ix). Since the Minister has expertise at applying his own statute, it is difficult to see the relevance of discussing the interpretation of the external statute in *CBC*. Where the standard of review for a decision is patent unreasonableness, there is no reason to scrutinize more closely the decision maker's interpretation of its own statute.

10 Indeed, this Court developed the patent unreasonableness standard in the context of agencies engaged in interpreting their enabling legislation. The reviewing court's question will often be whether the statute can bear the agency's interpretation. This frequently requires of the reviewing court that it defer to the agency's interpretation of the enabling legislation. As L'Heureux-Dubé J. wrote for this Court in *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756, at p. 775, the patent unreasonableness standard ensures "that review of the correctness of an administrative interpretation does not serve, as it has in the past, as a screen for intervention based on the merits of a given decision". See also *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324; *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227.

11 Where, as here, the factors indicate that the question raised by the provision is one intended by the legislators to be left to the exclusive decision of the administrative decision maker (*Pushpanathan*, *supra*, at para. 26; *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890, at para. 18, *per* Sopinka J.), it is not one for the courts to make. Assignment of such questions to the decision maker does not serve merely to permit experienced persons to compile the record for the inevitable judicial review proceedings in a superior court. This is particularly clear in the present case, where the decision maker's — the Minister's — function is only to name a chairperson so that arbitration may proceed expeditiously. For the statutory scheme to function, the parties must believe, as a general rule, that where their disagreement requires the Minister to name a chairperson, that chairperson is validly chosen and the arbitration must proceed.

12 The difficulty may stem from Binnie J.'s importing a practical sense of how decisions are actually made into the specialized judicial review context. Obviously, one could divide nearly every administrative decision into preliminary determinations. Even a purely legal question of statutory

interpretation relies on the prior factual determination that the decision maker was reading the correct version of the Act and not some other document. In the course of selecting a chairperson for an arbitral board, the Minister made choices concerning for instance which officials to consult and determined how many options were open to him. But for judicial review to be workable, courts generally operate on the assumption that they can isolate a single decision to be reviewed. They then determine one standard of review for that decision. For present purposes, it is unworkable to view the Minister's naming of an individual as comprising multiple determinations.

13 Admittedly, the pragmatic and functional approach may require different standards of review for different questions. This recognizes that the diversity of the contemporary administrative state includes different types of decision makers. Parliament and the provincial legislatures have not structured or qualified every agency to determine finally the same types of question. But judicial review would become grossly unwieldy and complex if each decision was to be viewed as a multiplicity of preliminary determinations.

14 The question, then, is the standard of review for the exercise of the Minister's appointment power under s. 6(5) of the *HLDAA*. In my view, *Pushpanathan*, *supra*, and this Court's subsequent jurisprudence indicate unambiguously that the appropriate standard is patent unreasonableness.

15 First, as Binnie J. notes, a privative clause (s. 7) precludes judicial review of a ministerial appointment. As noted in *Pushpanathan*, *supra*, at para. 30, the presence of a privative clause "is compelling evidence that the court ought to show deference to the [administrative decision maker's] decision".

16 As Iacobucci J. noted in *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para. 50, the second and third factors, expertise and the purpose of the provision and the Act as a whole, often overlap. I will discuss them together. I agree with Binnie J. that the Minister and his officials know more about labour relations than do the courts. This Court has recently confirmed in a labour context that courts owe deference to the expert decision makers designated by the legislature: *Ivanhoe inc. v. UFCW, Local 500*, [2001] 2 S.C.R. 566, 2001 SCC 47; *Ajax (Town) v. CAW, Local 222*, [2000] 1 S.C.R. 538, 2000 SCC 23. Although, as Binnie J. notes, the Minister is asked to make an appointment on behalf of the parties, the particular provision at issue does not simply refer to a "qualified" person. Rather, s. 6(5) states that an appointee is to be qualified "in the opinion of the Minister". I shall return to this important distinction in my discussion below of the relevant considerations. This specific language in the enabling provision demands deference: *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1, at para. 30, where the legislation at issue referred, as in the present appeal, to the opinion of the Minister. See also *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, [2001] 2 S.C.R. 281, 2001 SCC 41, at para. 57, *per* Binnie J.

17 I wish to emphasize the importance of expertise in determining the standard of review. Iacobucci J. has stated that expertise "is the most important of the factors that a court must consider in settling on a standard of review": *Southam*, *supra*, at para. 50. Expertise is the "substantive rationale for deference" (D. Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 290). The concept of the specialization of duties requires that deference be shown to decisions of specialized tribunals on matters falling within their expertise: *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, at p. 591, *per* Iacobucci J.; *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722, at pp. 1745-46, *per* Gonthier J. This concept obviously applies to full-time tribunals composed of members possessing special qualifications or who presumptively acquire expertise during their lengthy terms (*Southam*, *supra*; *Pezim*, *supra*; *National Corn Growers*, *supra*; *New Brunswick Liquor Corp.*, *supra*). Yet other decision makers are also to be accorded deference on the basis of an expertise superior to that of the reviewing court. In *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, 2002 SCC 11, at paras. 50-53, this Court held that the collegial composition of the New Brunswick Judicial Council, among other factors, amounted to some expertise deserving deference, even though no member of the Council necessarily had qualifications any different from those of the reviewing judge. In *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20, at para. 32, the Court noted that the fact of being a lay person could, in the context of a lawyers' Discipline Committee, amount to a certain expertise distinct from that of a court in the sense that a lay person may better understand how particular forms of conduct and choice of sanctions would affect the general public's perception of the legal profession and confidence in the administration of justice. As for Ministers exercising discretion, this Court's jurisprudence makes clear that they will be taken to have expertise, by virtue of their position, their ability to weigh policy concerns, and their access to information: *Suresh*, *supra*, at para. 31; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 59. In this case, in particular, the labour relations context is one more appropriately left to management by the legislatures and the executive than by the courts. As LeBel J. recently noted, "[t]he management of labour relations requires a delicate exercise in reconciling conflicting values and interests. The relevant political, social and economic considerations lie largely beyond the area of expertise of courts": *R. v. Advance Cutting & Coring Ltd.*, [2001] 3 S.C.R. 209, 2001 SCC 70, at para. 239. In the present case, then, the formal rationale for deference provided by the legislative text "in the opinion of the Minister" overlaps with the substantive rationale for deference, the fact that the Minister actually is better positioned to make the assessment than any reviewing court.

18 Finally, the fourth factor, the nature of the question, also points to deference. Appointment of a particular arbitrator to a particular hospital labour dispute is "highly fact-based and contextual": *Suresh*, *supra*, at para. 31. More generally, discretionary decision makers are given "substantial leeway" and are presumptively due deference: *Baker*, *supra*, at para. 56. Furthermore, empowering the Minister, as opposed to an apolitical figure such as the Chief Justice of the province, suggests a legislative intent that political accountability also play a role in policing appointments and the integrity of hospitals interest arbitration. See *Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)*, [1997] 1 S.C.R. 12, at para. 50, *per* Major J.

19 The Minister's appointments are thus reviewable only on the most deferential, patent unreasonableness standard, and it is this standard I shall now apply.

II. Was Appointing Retired Judges Patently Unreasonable?

A. *The Standard of Patent Unreasonableness*

20 Before answering this question, it is helpful to review some of the ways that this Court has articulated the test for patent unreasonableness. These are not independent, alternative tests. They are simply ways of getting at the single question: What makes something patently unreasonable?

21 In *Suresh*, *supra*, at para. 41, this Court indicated that a patently unreasonable decision is one that is unreasonable on its face, unsupported by evidence, or vitiated by failure to consider the proper factors or apply the appropriate procedures. This linkage of the nominate grounds for abuse of discretion with the patent unreasonableness standard demonstrates the unified approach to review of discretionary decision making set out by L'Heureux-Dubé J. in *Baker*, *supra*. Other formulations of the test for patent unreasonableness are also helpful. Most relevantly in this appeal, other formulations assist in construing the terms "vitiated by failure to consider the proper factors". A reweighing or reconsideration of factors that were originally considered will not suffice to vitiate the decision. Furthermore, it is not necessarily sufficient that a new relevant factor be invoked to vitiate the ministerial decision.

22 In *Ryan*, *supra*, Iacobucci J. writes that "[a] decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand" (para. 52).

23 In *Southam*, *supra*, Iacobucci J. distinguishes the reasonableness *simpliciter* standard from that of patent unreasonableness. He states that the difference lies "in the immediacy or obviousness of the defect. If the defect is apparent on the face of the tribunal's reasons, then the tribunal's decision is patently unreasonable." A decision is not patently unreasonable, he says, "if it takes some significant searching or testing to find the defect". He says too that "once the lines of the problem have come into focus, . . . the unreasonableness will be evident" (para. 57). Another way of getting at the evident quality of the unreasonableness is to say that once identified, a defect rendering a decision patently unreasonable "can be explained simply and easily" (*Ryan*, *supra*, at para. 52).

24 In *Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941 ("*PSAC*"), Cory J. states that the "very strict test" of patent unreasonableness is whether the decision is "clearly irrational, that is to say evidently not in accordance with reason" (pp. 963-64).

25 These formulations indicate the high degree of deference in the patent unreasonableness standard. Even where a reasonableness *simpliciter* standard applies, the question is not what decision the reviewing judge would have made in the shoes of the administrative decision maker: *Southam*, *supra*, at paras 79-80, *per* Iacobucci J. This is even more the case when the standard is patent unreasonableness. Indeed, this Court has stated explicitly that a reviewing court's role is not to reweigh the factors considered by the discretionary decision maker: *Suresh*, *supra*, at paras. 37-41. Nor is the goal to review the decision or action on its merits: *Canadian Union of Public Employees, Local 301 v. Montreal (City)*, [1997] 1 S.C.R. 793, at para. 53, *per* L'Heureux-Dubé J.

26 Having set out this background on the standard, I turn now to apply that standard to the Minister's appointments of chairpersons.

B. *Application of the Standard*

27 Binnie J. concludes that the appointments were patently unreasonable because the Minister's approach excluded relevant criteria (labour relations experience and broad acceptability) and substituted another criterion (prior judicial experience).

28 This assessment requires that we determine the relevant criteria for exercise of the discretion, or at least whether the Minister relied upon irrelevant criteria or failed to consider a relevant and important criterion. I agree with Binnie J. that a contextual approach to statutory interpretation of the enabling legislation is necessary for determining the relevant criteria. We disagree, however, as to what the essential criteria ultimately turn out to be. We disagree as to which factor or factors must be given primary importance for an appointment to survive review as not "clearly irrational" or patently unreasonable.

29 In the clearest of cases, the criteria constraining the exercise of a discretion will be spelled out in the legislation itself. In other cases, the relevant factors to consider will be specified in regulations or guidelines. For example, in *Baker*, *supra*, this Court quashed the immigration officer's decision. In making the decision, the officer had failed to consider a factor expressly included in the relevant guidelines issued by the Minister of Citizenship and Immigration. Other indications of the important considerations were found in the specific purposes of the relevant Act and in international instruments (*Baker*, *supra*, at para. 67). In that appeal, the appropriate standard of review was the less deferential standard of reasonableness *simpliciter*. In other words, *Baker* says nothing one way or the other as to whether the failure to weigh heavily the interests of the children — a factor explicitly stated in the relevant documents — would have vitiated the decision as patently unreasonable. In yet another

category of cases, the relevant factors may be unwritten, derived from the purpose and context of the statute. For example, in *Roncarelli*, *supra*, this Court reasonably inferred that denying or revoking a liquor permit for reasons irrelevant to the sale of liquor in a restaurant lay beyond the scope of the discretion conferred upon the Commission by the *Alcoholic Liquor Act*. Note, however, that it was an irrelevant factor that was inferred in *Roncarelli*. A statute cannot reasonably spell out and exclude in advance every irrelevant, bad faith or abusive consideration. It is much simpler for a legislator to spell out the relevant factors, and we often expect it to have done so. I would caution, then, against reviewing courts too easily concluding that implied factors are relevant and that failure, first to perceive them at all, and second to consider them, vitiates a decision. What, then, are the relevant factors in this case?

30 In this case, the statute does not say very much. It stipulates that appointees must be "qualified to act". It also states, significantly, that it is "in the opinion of the Minister" that such persons must be qualified to act. In other words, the statute expressly contemplates that the Minister's opinion is important. I have already noted these words in determining the appropriate degree of deference. There are no relevant regulations, guidelines, or other instruments. Are there other relevant factors? In other words, can the reviewing court infer other factors relevant to the Minister in appointing a chairperson under s. 6(5) from the legislative context?

31 Binnie J. states that the "need for labour relations expertise, independence and impartiality, reflected in broad acceptability, has been a constant refrain of successive Ministers of Labour" (para. 177). I am not persuaded that either repetition of this need by Ministers of Labour or the context in which particular labour relations expertise and broad acceptability may have appeared essential constitutes a basis for implying dominant factors, as if they were stipulated in regulations or guidelines. Nor are these factors obvious, like the fact, in *Roncarelli*, *supra*, that discretion to renew a liquor licence must not be wielded to punish a person who posts bail for fellow members of a religious minority.

32 I have already noted that a patently unreasonable decision is one marked by the immediacy or obviousness of the defect. Where the alleged defect is failure to consider relevant factors, I think it important that those factors must themselves be immediately identifiable or obvious. In accordance with their duty, counsel for the respondents have assiduously compiled a record that presents the need for labour relations expertise and broad acceptability in its best light. They have collected excerpts from various reports, the legislative history of the *HLDAA*, and statements by Ministers of Labour. The fact that these materials are neatly compiled in the respondents' record makes the significance of those criteria obvious, or at least much more obvious, than it has ever been. I do not dispute that the respondents made a good case for the importance of reading those factors into the statute, but doing so was a difficult task. In my view, the general affirmations and aspirations Binnie J. refers to in para. 110 came nowhere near the evidentiary threshold for imposing a specific restriction on the wide discretion set out in s. 6(5). Would the factors Binnie J. relies upon have been obvious to a new Minister of Labour called on to exercise his discretion under s. 6(5)? Could the Minister have been expected to compile a thorough history of the *HLDAA* before acting? I do not believe so.

33 Binnie J. states that there is no need to impute to the Minister a knowledge of the *HLDAA*'s legislative history, because the Minister himself summarized the legislative intent in a letter. My difficulty with this comment is that the reviewing court's exercise is simply to determine what is required by the enabling statute. If, as I suggest, we could not reasonably expect that the bare text of s. 6 (5) would give to a subsequent Minister of Labour an appreciation of all the factors that Binnie J. finds relevant, this is significant. Binnie J. also characterizes that letter of February 2, 1998, as having "defined" the Minister's mandate (para. 183). I do not think that statements by the Minister expressing his opinion as to his own role should be taken as constraining his discretion or as, effectively, writing new conditions into the statute. The Minister could not eliminate relevant statutory criteria by making a statement or writing a letter; I do not think that by the same means he can add any. The Minister's own letter does not constrain his discretion or define his mandate in the same way that, in *Baker*, official guidelines, the specific purposes of the Act, and the pertinent international instruments framed the relevant considerations for the administrative official. Indeed, the letter of February 2, 1998, is not inconsistent with the Minister's eventual appointments: the Minister was of the opinion that the parties must perceive the process as credible; he was also, evidently, of the opinion that the persons he appointed were qualified to act.

34 Binnie J. notes that the parties brought our attention to subsequent provincial legislation, the *Back to School Act (Toronto and Windsor), 2001*, S.O. 2001, c. 1, that explicitly enables a Minister to appoint a replacement arbitrator lacking certain characteristics. The unions suggested that where the legislature wishes to rule out relevant experience and the other *indicia* of an objectively qualified chairperson, it knows how to do so. I note that such a provision also shows that, where the legislature so intends, it knows how to specify in some detail the positive or negative attributes of potential chairpersons. In any event, it is an error, in my view, to assume, *a contrario*, that the term "in the opinion of the Minister, qualified to act" in the *HLDAA* requires the presence of characteristics that may be dispensed with under the later, unrelated statute.

35 The Minister in the present appeal developed an opinion as to who was qualified to act. He determined that judging experience was relevant. He valued professional experience as an impartial decision maker. He recognized that judges are typically generalists who quickly learn the necessary substance within the context of each case. The Minister clearly gave experience in the health field less weight than some would have preferred; this is because he was dealing with parties unable to agree on a mutually acceptable qualified person and thought experience as an impartial decision maker was more crucial. All we can presume is that, all things considered, he found independence and experience at judicially resolving disputes to be more important. The *HLDAA* called for the Minister to reach his own opinion, not to consider a specific determining factor. In my view, Binnie J. has effectively read out of the provision one of its most important elements, that it is in the Minister's opinion, not viewed objectively by some constant standard, that persons are to be qualified. This is not to say that the opinion of the Minister is totally unfettered, as I will explain later in these reasons.

36 Given how much work it takes even to identify the factors at issue in this appeal (labour relations experience and broad acceptability) and to imply them into s. 6(5), I am reluctant to conclude that weighing them less heavily than another factor, also unwritten (judicial experience), vitiated the appointments as patently unreasonable. Using the language of Iacobucci J. in *Southam*, at para. 57, cited above, I would say that the Minister's appointments were not patently unreasonable because "it takes some significant searching or testing to find the defect", if there is one. More problematic for Binnie J.'s approach, in my view, is the fact that it takes "some significant searching" even to find the factors said to constrain the Minister. It is difficult to characterize the Minister's appointments as immediately or obviously defective, particularly when the factors are not themselves immediately or obviously ascertainable. The flaw cannot be explained simply and easily. Or to draw on Cory J.'s approach in *PSAC*, *supra*, at pp. 963-64, it is difficult to argue that the appointments were "evidently not in accordance with reason" or "clearly irrational". Turning to *Ryan*, when the compelling rationale for curial deference is borne in mind — in particular the Minister's superior expertise at labour relations — it becomes difficult to say that the appointments are "so flawed that no amount of curial deference" could justify letting them stand. Returning, finally, to *Suresh*, a failure to consider the proper factors, even if I were to accept them as determinative, fails to vitiate the Minister's decision because the factors themselves were not obvious and uncontroversial. These are all different ways of expressing the conclusion that the appointments were not patently unreasonable.

37 This is not to say that others would have made the same appointments, nor is it to speculate whether, if polled, the electorate would or would not approve. But in light of the statutory scheme, the context, and the deference due the Minister, I cannot say that the appointments satisfied the "very strict test" (*PSAC*, *supra*, at p. 964) marking them as patently unreasonable. Moreover, the legislation requires us to give weight to the Minister's opinion of the factors, or at least of what would make someone qualified to act.

38 Arguments made by both the appellant and the respondents impel me to make two related further comments.

39 First, my conclusion respecting the appointments challenged in this appeal does not endorse the appellant's submission that the sole factors that would disqualify a person from appointment as a chairperson under s. 6(5) are those explicitly set out in s. 6(12) of the *HLDAA*. That subsection precludes the Minister from appointing a person who has a pecuniary interest in the matters before the board or who has acted as counsel for one of the parties within the previous six months. I do not accept the appellant's argument that this is an exhaustive listing of all disqualifying factors or factors that would render an appointment patently unreasonable.

40 Second, as the respondents note, it is of course the case that the Minister's discretion to appoint is not unfettered and must be exercised within the scope of the Act: *Baker*, *supra*; *Padfield*, *supra*; *Roncarelli*, *supra*. My conclusions here do not authorize the Minister to decide to appoint only members of his own political caucus, hospital CEOs, or union business agents. These extreme examples

are not, however, the facts before us in this appeal.

III. Can the Unions Challenge the Boards' Independence and Impartiality Here?

41 Having decided that the appointments were patently unreasonable on the basis of irrelevant considerations, Binnie J. goes on to consider an alternative argument. He considers whether the Minister's appointments were also patently unreasonable on the basis that they resulted in arbitration boards possibly perceived as lacking institutional independence and impartiality.

42 Binnie J. addresses this argument primarily on the basis that the Court of Appeal declared that the Minister "created a reasonable apprehension of bias and interfered with the independence and impartiality of boards of arbitration . . . contrary to the principles and requirement of fairness and natural justice" (para. 186).

43 I agree with Binnie J. that neither concerns about institutional independence (the *ad hoc* tribunals' lack of security of tenure) nor institutional impartiality (appointment of persons from the class of retired judges) render the Minister's exercise of his appointment power patently unreasonable. The statutory scheme requires that the tribunals be *ad hoc*, constituted to resolve a particular dispute. Retired judges as a class cannot reasonably be seen as so partial that finding them to be "qualified to act" took the Minister outside the bounds of his statutory discretion: *Baker*, *supra*; *Padfield*, *supra*; *Roncarelli*, *supra*.

44 I also agree with Binnie J. that the unsuccessful challenge to the institutional independence and impartiality of the boards as a group does not foreclose the possibility of a successful challenge to a particular board by a party on the basis of particular facts. Indeed, in my view, it is awkward to raise arguments relating to the boards' independence and impartiality in the context of a challenge to the exercise of the Minister's discretion. In exercising his power of appointment under s. 6(5), the Minister cannot be expected to anticipate and avoid the full set of factors that might, in the context of a particular board, run afoul of the duty of procedural fairness that will bear upon that board. Even for strategic purposes, I would have thought it best for the respondents to save arguments about the natural justice requirements of the boards for any eventual challenge to a particular board. As this Court has noted, attacks on the independence or impartiality of a board are most convincingly made with evidence of how that board operates in practice: *Katz v. Vancouver Stock Exchange*, [1996] 3 S.C.R. 405, at para. 1; *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3, at paras. 117-23, *per* Sopinka J. My opinion on this point finds support in the decision of Binnie J. not to apply retrospectively a finding that the boards constituted by the Minister were not impartial.

45 I note in passing that, in framing the allegations concerning the boards' independence and impartiality as a claim that the Minister exercised his power patently unreasonably, Binnie J. is generous. He presents this line of argument in by far its most favourable light. A reading of the respondents' factum easily suggests that they were making the argument that if the Minister appointed boards that would themselves, in operation, fall short of the demands of natural justice, he thereby breached his own duty of procedural fairness. This is certainly the implication from the respondents' arguments, in this context, that the duty of fairness required the Minister to exercise his appointment power in conformity with the principles of natural justice. As Binnie J. discusses, however, there is no sound argument in this case that the Minister acted unfairly in the sense of violating his duty of procedural fairness.

46 To conclude, a reviewing court should not, in my view, find too readily that a discretionary decision was patently unreasonable. To do so dilutes the value of the patent unreasonableness standard and promotes inappropriate judicial intervention. Recognition of the seriousness of quashing a decision as patently unreasonable is crucial to maintaining the discipline of judicial restraint and deference. This is especially the case where there were few indicators in the enabling legislation of the scope of the power and in an area where this Court has repeatedly counselled deference towards political and other expertise. I do not think that the Minister's appointments demand our intervention.

47 For the reasons given, I would allow this appeal.

The judgment of Gonthier, Iacobucci, Binnie, Arbour, LeBel and Deschamps JJ. was delivered by

48 BINNIE J. — In 1965, the Ontario legislature determined that collective bargaining rights must yield to the paramount needs of patient care. The result is that, at present, to avoid disruption in essential services, about 200,000 hospital and nursing home workers in Ontario and their several hundred employers around the province are required to resolve their differences over wages, benefits and other terms of their collective agreements through compulsory arbitration. The Ontario Court of Appeal, in a unanimous judgment, concluded that the appointment by the Minister of Labour of retired judges in February 1998 as chairpersons of the boards of compulsory arbitration could "reasonably be seen as an attempt to seize control of the bargaining process" and "to replace mutually acceptable arbitrators with a class of persons seen to be inimical to the interests of labour" ((2000), 51 O.R. (3d) 417, at para. 101). The Minister, that court concluded, as a member of the provincial government, had a "significant financial interest" in the outcome of the very arbitration whose chairpersons he selected (para. 21). He was ordered not to make any further appointments "unless such appointments are made from the long-standing and established roster of experienced labour relations arbitrators" compiled under s. 49(10) of the Ontario *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sch. A, s. 49(10) (para. 105).

49 I would dismiss the appeal, albeit for reasons that differ somewhat from those of the Court of Appeal. The Minister, as a matter of law, was required to exercise his power of appointment in a manner consistent with the purpose and objects of the statute that conferred the power. A fundamental purpose and object of the *Hospital Labour Disputes Arbitration Act*, R.S.O. 1990, c. H.14 ("*HLDAA*"), was to provide an adequate substitute for strikes and lockouts. To achieve the statutory purpose, as the Minister himself wrote on February 2, 1998, "the parties must perceive the system as neutral and credible". I would reject the unions' contention that the Minister was required to proceed with the selection of chairpersons by way of "mutual agreement" or from the s. 49(10) roster. Nor do I think that retired judges as a "class" could reasonably be seen as biased against labour. I would nevertheless affirm the fundamental principle underpinning the Court of Appeal's judgment that the *HLDAA* required the Minister to select arbitrators from candidates who were qualified not only by their impartiality, but by their expertise and general acceptance in the labour relations community.

50 The context here is very important. The *HLDAA* is not a broad policy vehicle. The Minister is given a narrow role. He is merely to substitute for the parties in naming a third arbitrator in case of their disagreement.

51 Given the context of the legislation, reinforced by its background and purpose disclosed in the legislative history, I do not think that any Minister, acting reasonably, could have rejected these limitations on his statutory mandate. His approach to his power of appointment on these occasions was, with respect, patently unreasonable.

I. Facts

A. *The Legislative Framework*

52 The *HLDAA* requires the hundreds of hospital boards and nursing homes within Ontario to bargain in good faith with the unions (if any) representing their respective employees to conclude a voluntary collective agreement. In the event the parties fail to reach an acceptable collective agreement, the *HLDAA* prohibits strikes or lockouts (s. 11(1)). Compulsory arbitration is imposed (s. 4). It takes place before a single arbitrator if the parties can agree (s. 5(1)), or before an arbitral panel of three members, two of whom are appointed by the parties, and a third member to be chosen by the other two members. If the designated members fail to agree on a third member, the *HLDAA* provides in s. 6(5) that "the Minister shall appoint as a third member a person who is, in the opinion of the Minister, qualified to act".

53 A distinction must be drawn between "grievance arbitration", where the arbitrator(s) are required to interpret a collective agreement previously arrived at, and "interest arbitration" in which the arbitrator(s) decide upon the terms of the collective agreement itself. The former is adjudicative; the latter is more or less legislative. According to the evidence of Professor Joseph Weiler, who has been actively involved in labour disputes since 1975, experience has shown that successful "interest" arbitrators come to their task familiar with the "current issues in labour relations" and the "bargaining history of the parties to various collective agreements in relevant public sector industries". Further, "[t]hey are familiar with seniority, compensation and job evaluation systems, work preservation practices, and other work rules. In short, they can readily understand how their judgments in arbitration awards will affect the workplace realities of employees, unions, and management. They do not have to start each arbitration by being 'educated' by the parties as to the intricacies of their particular workplaces."

B. *Legislative History*

54 Evidence of a statute's history, including excerpts from the legislative record, is admissible as relevant to the background and purpose of the legislation.

55 Until 1965, hospital workers in Ontario were covered in the ordinary way by the *Labour Relations Act*, R.S.O. 1960, c. 202. They had the right to bargain collectively and, if no agreement was made, to strike. In the early 1960s, a significant strike occurred at the Trenton Memorial Hospital, which lasted from October 31, 1963 to February 5, 1964. The attendant controversy, fed by an earlier strike at a Windsor hospital, led to the establishment of the Royal Commission on Compulsory Arbitration in Disputes Affecting Hospitals and Their Employees "to inquire into and report upon the feasibility and desirability of applying compulsory arbitration in the settlement of disputes between Labour and Management over the negotiation and settlement of terms of collective agreements affecting hospitals and their employees" (p. 5 of its Report).

56 The Commission, consisting of labour and management representatives and chaired by a County Court judge experienced in labour relations, heard submissions from a wide spectrum of opinions in the labour relations community, including reluctant encouragement towards compulsory arbitration from Professors H. W. Arthurs and J. H. G. Crispo, who wrote (at p. 16 of the Report):

> At the present time, unless the parties voluntarily agree to arbitrate their differences, a strike or lockout is the only alternative to settlement. However, hostile community opinion added to the normal risks of economic warfare, may force one party to accept an unjust or unrealistic settlement rather than wage war. The party which yields its just or realistic claim in the public interest is thus unfairly disadvantaged. Such settlements are bound to sow resentment which will yield a rich crop of future antagonisms. In this particular context, compulsory arbitration may actually strengthen collective bargaining.

57 With similar reluctance, a majority of the Commissioners (the labour designate dissenting) recommended compulsory arbitration "when patient care is adversely affected" (p. 50) or either party had been convicted of bad faith bargaining. The reluctance was made explicit in their report (at pp. 43-44):

> The members of this Commission have had experience sitting as arbitrators in negotiations disputes where their decisions were binding upon the parties . . . . We think it [is] undisputable . . . from our experience that the parties themselves are in a much better position to arrive at a proper and reasonable decision in these contract disputes than a board of arbitration no matter how much evidence the board hears or how carefully it considers the problems with which it is confronted.

58 Concluding, however, that hospitals were in a "special category" like police and firefighters, a majority of the Commissioners recommended the creation of a tripartite board, with representatives of labour and management, as well as an independent chair, based on the *explicit* assumption that "the nominees of labour and management, presumably knowledgeable in hospital affairs, would be a safeguard against unreasonable awards. Only chairmen experienced in hospital affairs would be appointed" (Report, at p. 51 (emphasis added)).

59 The Commissioners' emphasis on industry expertise was echoed in their recommendation to strengthen conciliation services with experienced people (at p. 55):

> The conciliation officer and the chairman of the conciliation board should be carefully selected from those qualified and experienced in hospital affairs. This policy, we believe, has been followed by the Department of Labour. [Emphasis added.]

60 The dissenting member of the Commission stated, somewhat prophetically (at p. 58):

> . . . there is considerable evidence that compulsory arbitration simply cannot be made to work if the parties are not willing that it should.

61 The government of the day concluded that *any* strike at a hospital (defined to include nursing homes) must inevitably affect patient care (the "paramount" consideration) and proposed that the *HLDAA* extend compulsory arbitration to prohibit *all* hospital strikes or lockouts, i.e., well beyond the more limited role foreseen in the Commissioners' recommendations.

62 In the debate on the bill, the Minister of Labour told the legislature that "[s]ound labour relations are the product of mutual agreement" (*Legislature of Ontario Debates*, No. 35, 3rd Sess., 27th Leg., March 3, 1965, at p. 935). He brushed aside opposition concerns about the possibility a Minister could "pack" an arbitration board, given the government was a "vitally interested party financially in labour disputes in hospitals" (*Legislature of Ontario Debates*, No. 53, 3rd Sess., 27th Leg., March 22, 1965, at p. 1497), emphasizing the government's intention was to protect patients, not employers, and thereby to supplement, not hinder, free collective bargaining. The *HLDAA* became law on April 14, 1965.

C. *The 1972 Amendment*

63 Despite the prohibition on strikes and lockouts, problems persisted in the hospital sector. There were threats of strikes and several short walk-outs. A report prepared for the Minister of Labour in 1970 noted that "[t]hese are part of a continuing protest by union members generated by concern over their ability to achieve their bargaining goals while operating under the Act. All unions in the hospital industry are either demanding changes in or abolition of [the *HLDAA*]": K. McLeod, "The Impact of the Ontario Hospital Labour Disputes Arbitration Act, 1965: A Statistical Analysis", Ontario Department of Labour, Research Branch, November 1970, at p. 1.

64 Delays in making collective agreements were endemic. The Minister proposed a series of amendments to make compulsory arbitration speedier and more effective. Amongst other things, he assured the Legislature that *HLDAA* arbitrators would have relevant expertise as well as impartiality, stating "the bill provides for the [arbitration] commission to maintain a list of qualified arbitrators willing to act in hospital cases. This bill will improve the quality of decision-making in these cases by providing a roster of knowledgeable arbitrators experienced in the hospital sector" (*Legislature of Ontario Debates*, No. 134, 2nd Sess., 29th Leg., December 14, 1972, at p. 5760 (emphasis added)). Although s. 6(5) as originally enacted in 1972 included reference to a "register of arbitrators", the reference was deleted from the *HLDAA* in 1980.

D. *1979 — The Roster of Arbitrators*

65 In 1979, the *Labour Relations Act*, R.S.O. 1970, c. 232, was amended to facilitate the approval of qualified arbitrators under what is now s. 49 of the *Labour Relations Act, 1995* which largely concerns itself with grievance arbitrations, and provides in subs. (10) as follows:

> (10) The Minister may establish a list of approved arbitrators and, for the purpose of advising him or her with respect to persons qualified to act as arbitrators and matters relating to arbitration, the Minister may constitute a labour-management advisory committee composed of a chair to be designated by the Minister and six members, three of whom shall represent employers and three of whom shall represent trade unions, and their remuneration and expenses shall be as the Lieutenant Governor in Council determines. [Emphasis added.]

66 The Labour Management Advisory Committee ("LMAC") was duly formed. The Court of Appeal found that, since its inception, LMAC "has ensured that all persons on the list have expertise in the area of labour adjudication and are acceptable to both management and union. In addition to evaluating everyone seeking to be added to the list of arbitrators, LMAC plans and monitors an Arbitrator Development Program. Many persons are required to successfully complete this program before becoming eligible to be placed on the list. LMAC also conducts ongoing reviews of all the arbitrators on the list to ensure their continued acceptability. Its recommendations regarding additions to and removals from the list are invariably accepted by the Minister" (para. 12).

67 A contentious factual issue is the extent to which successive Ministers of Labour limited their appointments under s. 6(5) of the *HLDAA* to the s. 49(10) roster. There is nothing in the legislative history to suggest that the s. 49(10) list under the *Labour Relations Act* was intended by the legislature to substitute for the "register of arbitrators" dropped from the *HLDAA* in 1980. However, the unions contend that the third member of "interest" arbitration boards under the *HLDAA* ordinarily came from this list, even though the main focus of the roster was grievance (not interest) arbitrations. The Minister asserts that the roster was only one of many sources from which "interest" arbitrators were appointed. When the text of s. 6(5) was modified in the 1980 consolidation of Ontario statutes, there was no incorporation by reference to s. 49(10). The Court of Appeal, after reviewing the extensive evidentiary record, concluded that: "First, the main purpose of the machinery set up in 1979 was to produce persons qualified to do rights or grievance arbitrations who would be acceptable to both sides. Second, some of the persons so qualified are also skilled in interest arbitration. [Third,] for some years the vast majority of interest arbitrators has been appointed by the Minister or his or her delegate from amongst this second group. [Fourth], those appointed to chair interest arbitrations who were not from the group or roster were persons who were skilled and experienced in interest arbitration and were quite acceptable to the unions involved. They included such persons as Paul Weiler, Ray Illing, former Justice George Adams and [former] Chief Justice Alan Gold" (para. 16).

68 The evidence showed that in the normal course of government operations, senior officials, acting under delegated authority from the Ministers, would generally identify an appropriate arbitrator. This had the effect of distancing the Minister somewhat from the actual selection process.

E. *The 1997 Legislation*

69 Following the election of a new Progressive Conservative government in Ontario in 1995, a massive reorganization of municipalities, school boards, police stations, fire halls and other public sector institutions was undertaken. About 450,000 public sector employees were affected. As then Minister of Labour, Elizabeth Witmer, explained on second reading of Bill 136 on August 25, 1997:

> More than 3,300 collective agreements could be part of the transition as municipalities, school boards and health care facilities merge, amalgamate or reorganize. School boards alone will decrease from 129 to just 72 at the beginning of the year. By January 1, Ontario will have reduced its number of municipalities from 815 to about 650, and in Toronto alone the Health Services Restructuring Commission has recommended that the 39 hospitals currently operating in 46 separate facilities be reduced to 24 organizations operating 31 inpatient sites and four outpatient sites.
>
> As you can appreciate, special processes are needed to ensure that these employees, whether they are unionized or not, are treated as fairly as possible as the changes unfold.
>
> (Legislative Assembly of Ontario, *Official Report of Debates*, No. 218, August 25, 1997, at p. 11462)

70 As part of Bill 136, the government proposed the *Public Sector Dispute Resolution Act, 1997* to cover the fire, police and hospital/nursing home sectors. The centrepiece was to be a Dispute Resolution Commission, which the Minister was reported as saying would require members "with expertise in labor relations" (*The Record*, Kitchener-Waterloo, June 5, 1997, at p. B5) including academics and possibly judges. Quite apart from managing the effects of massive restructuring, the Commission was expected to address the problem of delay. The Minister claimed that

> [o]n average, arbitrated police agreements are concluded approximately 13 months after the expiry of the previous agreement. In the fire sector the figure is even longer, 20 months, and in the hospital sector agreements are finalized nearly two years after the expiry of a contract. This stands in stark contrast to the private sector where, as I indicated, it is all concluded within four months on average. This means that in some cases the employers and unions are learning the final result of an arbitration after the term of the arbitrated contract is over.
>
> (Legislative Assembly of Ontario, *Official Report of Debates*, No. 218, August 25, 1997, at p. 11464)

71 Organized labour strongly opposed many aspects of Bill 136 and the respondents in particular dismissed the proposed Dispute Resolution Commission as a move to replace experienced and mutually acceptable interest arbitrators with government-appointed commissioners who lacked independence and impartiality. Union leaders were quoted in the press as saying that a "government-appointed dispute resolution commission would be management-oriented and likely to gut existing contracts" (Canadian Press, September 18, 1997). Massive strike action was threatened. Following negotiations between the government and the unions, the government dropped its proposed Dispute Resolution Commission. On September 23, 1997, during the hearings before the Standing Committee on Resources Development, the Minister announced "a return to the sector-based system of appointing arbitrators" (Legislative Assembly of Ontario, *Official Report of Debates*, No. R-69, Standing Committee on Resources Development, September 23, 1997, at p. R-2577). The unions took such assurances to mean that the government was going to return to what they claimed to be the *status quo ante*. Thus, in a letter dated January 7, 1998, the President of the Canadian Union of Public Employees ("CUPE") wrote to the Minister to "confirm" that the unions were to be consulted about the appointments and to request assurances that the government would only choose arbitrators from the s. 49(10) roster. He received no response.

72 On February 2, 1998, the Minister of Labour, now James Flaherty, wrote to the Ontario Labour-Management Arbitrators' Association to outline the purpose of the changes to Bill 136:

> The Act reforms compulsory interest arbitration processes to stress negotiated solutions instead of arbitrated contracts, provide for expedited time lines and alternate dispute resolution mechanisms, and require arbitrators to consider criteria such as the employer's ability to pay, the economic situation in the municipality and province, and the extent to which services may have to be reduced if current funding and taxation levels remain unchanged.

73 Although the Minister speaks here of "reforms", the legislature did not, in the end, amend the provisions of the *HLDAA* at issue in this case.

F. *The Contested Appointments*

74 Early in 1998, the Minister decided to make his s. 6(5) appointments from amongst retired judges, a possibility earlier signalled to the parties by his predecessor, Elizabeth Witmer, in her June 5, 1997 press interview about the proposed Dispute Resolution Commission. One of the Minister's senior officials testified that he was instructed "to identify retired members of the judiciary who might be available to serve in the capacity of interest arbitrators".

75 On February 20, 1998, Labour Minister Flaherty appointed four retired judges — the Honourable Mr. Charles Dubin, the Honourable Mr. Lloyd Houlden, the Honourable Mr. Robert Reid and the Honourable Mr. McLeod Craig — to chair boards of interest arbitration to resolve a number of outstanding labour disputes at Ontario hospitals. The judges were not on the s. 49(10) roster, nor were the unions consulted about the appointments. A background statement was issued by the Ministry of Labour on the same day entitled "Interest Arbitration in the Hospital Sector", which noted:

> During this period of significant restructuring in the broader public sector . . . it is essential that parties to an arbitration have complete confidence in the objectivity and neutrality of arbitrators appointed by the Minister.

On March 10, 1998, the President of the Ontario Federation of Labour ("OFL") wrote to the Minister alleging that the appointments breached the "understanding" about a return to the *status quo* "without even the pretence of consultation". Professor Joseph Weiler testified about the negative union reaction to the appointments of retired judges "as a class or group":

> This reaction is not due to the merits of any individual former judge but rather to retired judges as a class or group, given the view and experience of unions concerning the role of the judiciary in labour relations. These retired judges do not have tenure as arbitrators and therefore do not have the kind of independence from government that they previously

> enjoyed when they served on the bench. They also have no expertise in industrial relations. Certainly they lack the deep and wide experience possessed by arbitrators familiar with the industrial relations community of Ontario.

76 The four judges initially appointed declined to act. The Honourable Charles Dubin, for example, who had for many years acted as counsel to the Ontario Labour Relations Board, wrote to the parties to explain that, while he could not act because his firm had a conflict in the particular case, it was nevertheless his practice not to act as arbitrator unless he could assure himself that "[his] appointment was satisfactory to all parties". However, a number of other retired judges felt it appropriate to accept the appointments.

77 The unions further complained of a breach of procedural fairness. The Minister, they say, should not have abandoned a practice of delegating the task of the appointments to senior officials without, at least, full consultation.

78 Although the Minister took the view that his new practice of appointing retired judges to chair *HLDAA* arbitral boards was entirely neutral, it was apparently welcomed by hospital employers. The Court of Appeal found that "in every arbitration involving CUPE in which a chair had been appointed, the employer requested a new appointment. In all cases, the new appointment was a retired judge. Further, since the Minister began appointing retired judges, employers have advised CUPE that they are not prepared to accept anyone on the roster and have refused to propose names of potential chairs. Consequently, there have been no consensual appointments of chairs in CUPE cases since at least February 1998" (para. 33). This finding laid the basis for the Court of Appeal's conclusion, as mentioned, that the appointment of retired judges "must reasonably be seen as an attempt to seize control of the [collective] bargaining process" (para. 101).

G. *The Proceedings*

79 If the unions had sought judicial review of the specific appointments, it would have enabled the courts to deal with the legal issues raised by their challenge (including the independence and impartiality of particular appointees) on a case-by-case basis. Instead, the unions sought general relief by way of the series of general declarations already mentioned. The Minister was agreeable to this somewhat difficult procedure because, as his counsel explained, he did not want to be regarded as throwing technical roadblocks in the path of judicial review of his decisions. He did not, at least in this Court, seek to have the proceedings stopped on the basis of the privative clause in s. 7 of the *HLDAA*, perhaps because the challenge related broadly to the appointments process rather than to the composition

of particular boards. As counsel for the unions put it in the oral hearing in this Court:

> . . . it's not that retired judges were appointed. It is that the process by which individuals, who had been identified as mutually acceptable and credible, were, in one fell swoop, removed from participation in the arbitration process, and replaced by an entirely different group of individuals for whom, as the record subsequently established, experience in interest arbitration, experience in labour relations and experience in hospital funding was not a factor, in terms of their appointment.

80 The way these proceedings were formulated creates certain difficulties in the matter of remedy, as discussed below.

H. *The Subsequent Legislation*

81 The parties to the appeal in this Court drew our attention to the *Back to School Act (Toronto and Windsor) 2001*, S.O. 2001, c. 1, apparently enacted in response to the decision of the Ontario Court of Appeal in this case, which provides in s. 11(4) and (5):

> **11.** . . .
>
> (4) In appointing a replacement arbitrator, the Minister may appoint a person who,
>
> (a) has no previous experience as an arbitrator;
>
> (b) has not previously been or is not recognized as a person mutually acceptable to both trade unions and employers;
>
> (c) is not a member of a class of persons which has been or is recognized as comprising individuals who are mutually acceptable to both trade unions and employers.

(5) In appointing a replacement arbitrator, the Minister may depart from any past practice concerning the appointment of arbitrators or chairs of arbitration boards, whether established before or after this Act comes into force, without notice to or consultation with any employers or trade unions.

82 The Minister says the subsequent legislation is irrelevant. The unions say only that this subsequent legislation manifests an explicit legislative intent to exclude the otherwise crucially relevant criteria of expertise and general acceptability. In their view, the new legislation shows the *HLDAA* as the Minister would like it to be, but is not. They say the new Act is a clear and unmistakable departure from the *HLDAA* statutory scheme at issue in this appeal.

II. Relevant Statutory Provisions

83 *Hospital Labour Disputes Arbitration Act*, R.S.O. 1990, c. H.14

6. . . .

(5) Where the two members appointed by or on behalf of the parties fail within ten days after the appointment of the second of them to agree upon the third member, notice of such failure shall be given forthwith to the Minister by the parties, the two members or either of them and the Minister shall appoint as a third member a person who is, in the opinion of the Minister, qualified to act.

7. Where a person has been appointed as a single arbitrator or the three members have been appointed to a board of arbitration, it shall be presumed conclusively that the board has been established in accordance with this Act and no application shall be made, taken or heard for judicial review or to question the establishment of the board or the appointment of the member or members, or to review, prohibit or restrain any of its proceedings.

Labour Relations Act, 1995, S.O. 1995, c. 1, Sch. A

49. . . .

(10) The Minister may establish a list of approved arbitrators and, for the purpose of advising him or her with respect to persons qualified to act as arbitrators and matters relating to arbitration, the Minister may constitute a labour-management advisory committee composed of a chair to be designated by the Minister and six members, three of whom shall represent employers and three of whom shall represent trade unions, and their remuneration and expenses shall be as the Lieutenant Governor in Council determines.

III. Judgments

A. *Ontario Divisional Court* (1999), 117 O.A.C. 340

84 Southey J. noted that the respondents' claims were based on the Minister's abandonment of the roster, the Minister's personal appointments of chairs of boards, and the Minister's failure to comply with an understanding respecting the appointment process allegedly reached by the parties while amendments to Bill 136 were being discussed. As the respondents had not claimed any breach of *Canadian Charter of Rights and Freedoms* rights, he concluded that "actions of the Minister, if authorized by statute, cannot be successfully attacked as being a denial of natural justice or lacking in institutional independence or impartiality" (para. 16). In his view, the actions of the Minister in appointing retired judges to chair arbitration boards fell squarely within the authority given to him by statute.

B. *Ontario Court of Appeal* (2000), 51 O.R. (3d) 417

85 Writing for a unanimous Court of Appeal, Austin J.A. for the court stated, at para. 2:

The central issue in this appeal is whether the Minister, in changing the process [i.e., from making appointments from the s. 49 roster], violated the principles of natural justice by interfering with the impartiality and independence of the arbitrators and raising a reasonable apprehension of bias, and/or interfering with the legitimate expectations of the appellants.

86 In answering this question in the affirmative, Austin J.A. observed that the content of collective agreements between union and hospital does not involve "interpretation but rather fundamental matters determining the working conditions of union members. As such they are of vital concern to those members. Such matters are not essentially legal but practical and require the familiarity and expertise of a labour arbitrator rather than the skills of a lawyer or a judge" (para. 75).

87 Austin J.A. further noted that the government of Ontario has a substantial financial interest in the outcome of the arbitrations. The pre-existing system appeared to have worked reasonably well and must be regarded as having been successful.

88 In his view, retired judges generally lack the expertise of the prior arbitrators, are not independent, have no security, have no assurance that they will be appointed to future arbitrations, and must decide questions in which the person who appointed them has a substantial financial interest. He held that abandoning the established practice gave rise to a reasonable apprehension of bias and an appearance of interference with the institutional independence and the institutional impartiality of the boards.

89 Accordingly, the appeal was allowed.

IV. Analysis

90 The Minister argues that the wording of his power of appointment makes it clear that he and not the courts was intended to have the last word on appointments to chair compulsory arbitration boards in hospital and nursing home disputes. He says that the *HLDAA* does not condition his power on following any particular process, and it was open to him, in furtherance of government policy, to proceed as he did. Thus viewed, the central issue in this case is statutory interpretation. The *HLDAA* enacts quite a complex scheme that covers 11 pages of the statute book. The s. 6(5) power of appointment is an important element of the scheme, but it is only an element, and the *HLDAA*, as any statute, must be read as a whole to ascertain the true legislative intent.

91 The Minister does not claim an absolute and untrammelled discretion. He recognizes, as Rand J. stated more than 40 years ago in *Roncarelli v. Duplessis*, [1959] S.C.R. 121, at p. 140, that "there is always a perspective within which a statute is intended to operate".

92 The decision in *Roncarelli*, despite the many factual differences, foreshadows, in part, the legal controversy in this case. There, as here, the governing statute conferred a broad discretion which the decision maker was accused of exercising to achieve an improper purpose. In that case, the improper purpose was to injure financially (by the cancellation of a liquor licence) a Montreal restauranteur whose activities in support of the Jehovah's Witnesses were regarded by the provincial government as troublesome. Here, the allegations of improper purpose behind the unions' challenge are that the Minister used his power of appointment to influence outcomes rather than process, to protect employers rather than patients, and, as stated by the Court of Appeal, to change the appointments process in a way "reasonably" seen by the unions as "an attempt to seize control of the bargaining process" (para. 101). Still, the Minister points to a number of reasons for his conduct which, unlike the situation in *Roncarelli*, were closely associated with the purpose of the statute, including, in particular, the chronic delay and cost associated with *HLDAA* arbitrations. He was looking for "[p]eople who had spent their professional lives as neutrals".

93 The exercise of a discretion, stated Rand J. in *Roncarelli*, "is to be based upon a weighing of considerations pertinent to the object of the [statute's] administration" (p. 140). Here, as in that case, it is alleged that the decision maker took into account irrelevant considerations (e.g., membership in the "class" of retired judges) and ignored pertinent considerations (e.g., relevant expertise and broad acceptability of a proposed chairperson in the labour relations community).

94 In this case, the "perspective within which a statute is intended to operate" is that of a legislative measure that seeks to achieve industrial peace by substituting compulsory arbitration for the right to strike or lockout. The "perspective" is another way of describing the policy and objects of the statute. In the language of Lord Reid in *Padfield v. Minister of Agriculture, Fisheries and Food*, [1968] A.C. 997 (H.L.), at p. 1030:

> . . . if the Minister, by reason of his having misconstrued the Act or for any other reason, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the court. [Emphasis added.]

Lord Reid added that "the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the court" (p. 1030). See also: *Air Canada v. British Columbia (Attorney General)*, [1986] 2 S.C.R. 539; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 56; *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, [2001] 2 S.C.R. 281, 2001 SCC 41; G. Pépin and Y. Ouellette, *Principes de contentieux administratif* (2nd ed. 1982), at p. 264; D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at para. 13:1221.

95 This appeal thus brings to the fore the importance of the scheme and purpose of an Act in construing the particular words used by the legislature to disclose its true intent. It also requires us to consider whether the legislative intent disclosed in this case is sufficient to override the principles of natural justice that would otherwise be implied by the courts to limit the discretion of the statutory decision maker, and, if so, in what respect.

A. *Some Preliminary Observations*

96 Given the range and variety of the unions' objections, it might be useful to do a little organization at the outset.

97 Although the net result of a s. 6(5) appointment is the naming of a particular individual as a chairperson, the appointment is inevitably the product of a number of issues or determinations, some of them having to do with procedural fairness (e.g., do I first have to consult with the parties?), some of them legal (e.g., to what extent is my choice constrained by the *HLDAA*?), some of them factual (e.g., what qualifications am I looking for?), and others of mixed fact and law (e.g., is this individual "qualified" within the range of choice permitted to me by the *HLDAA*?). The court's task on judicial review is not to isolate these issues and subject each of them to differing standards of review. The unions' attack is properly aimed at the ultimate s. 6(5) appointments themselves. Nevertheless, as a practical matter (and practicality is a welcome virtue in this area of the law), it is convenient to group these issues in order to facilitate the judicial review of the s. 6(5) decision.

98 The first order of business is to examine the legislative scheme of the *HLDAA* in general and s. 6(5) in particular. As Beetz J. pointed out, "[t]o a large extent judicial review of administrative action is a specialized branch of statutory interpretation": *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, at p. 1087 (emphasis deleted), quoting S. A. de Smith, H. Street and R. Brazier, *Constitutional and Administrative Law* (4th ed. 1981), at p. 558. The court's mandate on judicial review is to keep the statutory decision maker within the boundaries the legislature intended.

99 In performing that mandate, of course, administrative law supplies certain inferences and presumptions. For example, as this Court recently affirmed in *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 S.C.R. 781, 2001 SCC 52, at para. 21, "courts generally infer that Parliament or the legislature intended the tribunal's process to comport with principles of natural justice". More broadly, it is presumed that the legislature intended the statutory decision maker to function within the established principles and constraints of administrative law.

100 The second order of business is to isolate the Minister's acts or omissions relevant to procedural fairness, a broad category which extends to, and to some extent overlaps, the traditional principles of natural justice. *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R 311, *per* Laskin C.J., at p. 325. The unions, for example, question whether the Minister was right to refuse to consult with them before making the appointments. These questions go to the procedural framework within which the Minister made the s. 6(5) appointments, but are distinct from the s. 6(5) appointments themselves. It is for the courts, not the Minister, to provide the legal answer to procedural fairness questions. It is only the ultimate exercise of the Minister's discretionary s. 6(5) power of appointment itself that is subject to the "pragmatic and functional" analysis, intended to assess the degree of deference intended by the legislature to be paid by the courts to the statutory decision maker, which is what we call the "standard of review".

101 The third order of business, accordingly, is to determine the degree of judicial deference which, having regard to the *HLDAA* and all the relevant circumstances, the Minister is entitled to receive in the exercise of his discretionary s. 6(5) power. In assessing the Minister's appointments, the court may need to take into consideration some of the determinations made by the Minister as input into the exercise of his discretion. For example, if, as I believe, the Minister is entitled to make any appointment that is not patently unreasonable, his interpretation of the scope of his power of appointment under s. 6 (5) will affect the reasonableness of his ultimate appointment: *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157, at para. 49.

102 The content of procedural fairness goes to the manner in which the Minister went about making his decision, whereas the standard of review is applied to the end product of his deliberations.

103 On occasion, a measure of confusion may arise in attempting to keep separate these different lines of enquiry. Inevitably some of the same "factors" that are looked at in determining the requirements of procedural fairness are also looked at in considering the "standard of review" of the discretionary decision itself. Thus in *Baker*, *supra*, a case involving the judicial review of a Minister's rejection of an application for permanent residence in Canada on human and compassionate grounds, the Court looked at "all the circumstances" on both accounts, but overlapping factors included the nature of the decision being made (procedural fairness, at para. 23; standard of review, at para. 61); the statutory scheme (procedural fairness, at para. 24; standard of review, at para. 60); and the expertise of the decision maker (procedural fairness, at para. 27; standard of review, at para. 59). Other factors, of course, did not overlap. In procedural fairness, for example, the Court was concerned with "the importance of the decision to the individual or individuals affected" (para. 25), whereas determining the standard of review included such factors as the existence of a privative clause (para. 58). The point is that, while there are some common "factors", the object of the court's inquiry in each case is different.

B. *Issues*

104 With these preliminary observations, I turn to the issues that arise for determination in the resolution of this appeal:

(1) the statutory interpretation of s. 6(5) of the *HLDAA*;

(2) procedural fairness issues:

(a) the Minister's alleged lack of impartiality;

(b) the Minister's alleged failure to consult with the unions about the change in the process of appointments;

(c) the alleged violation of the doctrine of legitimate expectation in refusing to nominate only arbitrators who had been mutually agreed upon;

(3) an assessment of the standard of review of the Minister's appointments;

(4) when does a decision rise to the level of *patent* unreasonableness?

(5) whether the applicable standard of review was violated by the Minister's rejection of

(a) the s. 49(10) list as a requisite of appointment, or

(b) expertise and "broad acceptability within the labour relations community" as

criteria for the selection of chairpersons;

(6) whether the Court of Appeal erred in finding that the arbitration boards, by reason of the impugned ministerial approach to s. 6(5) appointments, lacked the requisite institutional independence and impartiality;

(7) the appropriateness of the remedy granted by the Court of Appeal.

105 I will deal with each of these issues in turn.

(1) The Statutory Interpretation of Section 6(5) of the *HLDAA*

106 The appropriate approach to statutory interpretation is that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87, frequently cited with approval in this Court, e.g., *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at paras. 21 and 23; *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2, at para. 33). This contextual approach accords with the previously mentioned *dictum* of Rand J. in *Roncarelli*, *supra*, that "there is always a perspective within which a statute is intended [by the legislature] to operate" (p. 140), and Lord Reid's caution in *Padfield*, *supra*, that the particular wording of a ministerial power is to be read in light of "the policy and objects of the Act" (p. 1030).

107 The *HLDAA* contemplates the appointment of "a person who is, in the opinion of the Minister, qualified to act". The Minister is a senior member of the government with a vital interest in industrial peace in the province. His work in pursuit of that objective in the hospital sector, supported by his officials, should not be micro-managed by the courts. Still, as Rand J. said in *Roncarelli*, *supra*, at p. 140, the discretionary power is not "absolute and untrammelled". The discretion is constrained by the scheme and object of the *HLDDA* as a whole, which the legislature intended to serve as a "neutral and credible" substitute for the right to strike and lockout.

108 Compulsory arbitration is a fairly well-understood beast in the jungle of labour relations. Dickson C.J., dissenting on other grounds in *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, pointed out, at p. 380:

> The purpose of such a mechanism [compulsory arbitration] is to ensure that the loss in bargaining power through legislative prohibition of strikes is balanced by access to a system which is capable of resolving in a fair, effective and expeditious manner disputes which arise between employees and employers.

109 Labour arbitration as a dispute-resolution mechanism has traditionally and functionally rested on a consensual basis, with the arbitrator chosen by the parties or being acceptable to both parties. The intervener, National Academy of Arbitrators (Canadian Region), contended that "[a]rbitration which is, or is seen to be, political rather than rigorously quasi-judicial is no longer arbitration". Moreover, the intervener contends:

> If arbitrators are, or are perceived to be, a surrogate of either party or of government, or appointed to serve the interests of either party or of government, the system loses the trust and confidence of the parties, elements essential to industrial relations peace and stability. . . . A lack of confidence in arbitration would invite labour unrest and the disruption of services, the very problem impartial interest arbitration was designed to prevent.

110 As the Ontario legislature has considered the *HLDAA* over the years, it has demonstrated an awareness of the fact that workers who feel unfairly treated can manifest their grievances with slowdowns or other job actions, including illegal walkouts. Ministers emphasized that the purpose of the *HLDAA* was to protect patients, not to tilt the balance between employers and employees one way or the other. The "background and purpose" of the *HLDAA* includes the 1964 Report of the Royal Commission on Compulsory Arbitration in Disputes Affecting Hospitals and Their Employees, which led to the *HLDAA*, and recommended that "[o]nly chairmen experienced in hospital affairs would be appointed" (Report, at p. 51). The Minister proposing the 1972 amendment told the Ontario Legislature that the "quality of decision-making" would be improved by "knowledgeable arbitrators experienced in the hospital sector" (*Legislature of Ontario Debates*, December 14, 1972, at p. 5760). The 1979 amendment to the *Labour Relations Act* established what is now renumbered as the s. 49(10) roster of arbitrators who were considered to be impartial and knowledgeable in labour arbitrations (not necessarily hospital matters). Interest arbitrators were frequently, though by no means always, drawn from this roster between the early 1980s and 1997. The anchors that were seen to justify the parties' confidence in *HLDAA* arbitrations were impartiality, independence, expertise and general acceptability in the labour relations community. An individual who combines relevant expertise with independence and impartiality can reasonably be expected to be experienced in the field, thus known to and broadly acceptable to both unions and management.

111 I conclude, therefore, that, although the s. 6(5) power is expressed in broad terms, the legislature intended the Minister, in making his selection, to have regard to relevant labour relations expertise as well as independence, impartiality and general acceptability within the labour relations community. By "general acceptability", I do not mean that a particular candidate must be acceptable to all parties all the time, or to the parties to a *particular HLDAA* dispute. I mean only that the candidate has a track record in labour relations and is generally seen in the labour relations community as widely acceptable to both unions and management by reason of his or her independence, neutrality and proven expertise.

112 I do not consider these criteria to be vague or uncertain. The practice of labour relations in this country has developed into a highly sophisticated business. The livelihood of a significant group of professional labour arbitrators depends on their recognized ability to fulfill these criteria. Some of them not only enjoy national reputations for their skills in resolving industrial conflicts but are retired judges. From the Minister's perspective, there exists not only a large pool of recognized candidates, but the *HLDAA* allows generous latitude to his selection (i.e., a candidate "who is, in the opinion of the Minister, qualified"). The result is a perfectly manageable framework within which the legislature intended to give the Minister broad but not unlimited scope within which to make appointments in furtherance of the *HLDAA*'s object and purposes.

(2) Procedural Fairness

113 Under this heading, I group the challenges to the Minister's impartiality, the allegation that he violated procedural fairness by allegedly changing the "system" of appointments without prior consultation, and his alleged violation of the doctrine of legitimate expectation.

(a) *Was the Minister Impartial in the Exercise of the Power of Appointment?*

114 The unions say the Minister could not, as a member of a cost-cutting government, make the appointments impartially. He was therefore disqualified and ought to have delegated the appointments to senior officials.

115 The Minister says that he is not responsible for health costs or hospital administration. He is, however, a member of Cabinet and committed to government policy which, in 1997, included public sector "rationalization" and pay restraint. He was elected on a platform called "the Common Sense Revolution" and people would reasonably think he was committed to carrying it out.

116 The Ontario Court of Appeal concluded that the Minister had a "significant and direct interest" in the outcome of the arbitral awards (para. 21). As Austin J.A. pointed out, "[a]pproximately 75 per cent to 80 per cent of hospital budgets relate to labour costs and the government's primary method for controlling expenditures is wage control. Although nursing homes have sources of income that are not available to hospitals, they too are substantially dependent upon the government for funding" (para. 21). The Minister's response is that here, unlike in cases such as *MacBain v. Lederman*, [1985] 1 F.C. 856 (C.A.), at pp. 869-71 and 884, neither he nor his government was a party to hospital sector arbitral proceedings. In the *MacBain* case, the Canadian Human Rights Commission appointed the members of the *ad hoc* tribunal to adjudicate the very dispute between the Commission and the person complained about. The Minister argues that his interest in hospital finance is not "directly at stake" (*Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3, at para. 100) and "too attenuated and remote to give rise to a reasonable apprehension of bias" (*Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869, at p. 891). The local hospital boards could absorb higher unit labour costs by reducing services, thus keeping public funding requirements more or less constant. This approach, I think, is unrealistic. It underestimates the Minister's collective responsibility with his colleagues at a time of pitched confrontation with the unions over reductions in public sector staffing and financing. At the very least, there was an appearance that he had a significant interest in outcomes as well as process.

117 The legal answer to this branch of the unions' argument, however, is that the legislature specifically conferred the power of appointment on the Minister. Absent a constitutional challenge, a statutory regime expressed in clear and unequivocal language on this specific point prevails over common law principles of natural justice, as recently affirmed by this Court in *Ocean Port Hotel*, *supra*. In that case, the members of the provincial liquor licensing appeal board, who were empowered to impose penalties on liquor licences for non-compliance with the Act, were appointed to serve "at the pleasure" of the executive. Some licencees successfully argued before the British Columbia Court of Appeal that "at pleasure" appointees lacked the security of tenure necessary to ensure their independence. The Board's decisions were therefore set aside. On further appeal to this Court, however, it was held, *per* McLachlin C.J., that "like all principles of natural justice, the degree of independence required of tribunal members may be ousted by express statutory language or necessary implication" (para. 22 (emphasis added)). Affirming the rule of interpretation that "courts generally infer that Parliament or the legislature intended the tribunal's process to comport with principles of natural justice" (para. 21), the Court nevertheless concluded that "[i]t is not open to a court to apply a common law rule in the face of clear statutory direction" (para. 22 (emphasis added)). Further, "[w]here the intention of the legislature, as here, is unequivocal, there is no room to import common law doctrines of independence" (para. 27 (emphasis added)).

118 The courts will equally give effect in a proper case to exclusion by necessary implication. In *Brosseau v. Alberta Securities Commission*, [1989] 1 S.C.R. 301, for example, the legislature had clearly and unequivocally conferred both investigatory and adjudicative functions on members of the Alberta Securities Commission. In the absence of any constitutional challenge, the Court affirmed that the overlap of functions was permissible, provided the official in question did not go beyond "fulfilling his statutory duties" (p. 315).

119 *Ocean Port Hotel*, *supra*, involved adjudication of licensing violations in the context of government liquor policy. As was stated at para. 33, "[The Board] is first and foremost a licensing body. The suspension complained of was an incident of the Board's licensing function. . . . The exercise of power here at issue falls squarely within the executive power of the provincial government."

120 Here, the context is quite different. The government has the power to legislate workers back to work but the *HLDAA* holds out the promise of a "neutral and credible" process to reconcile the interests of the employer and employees. As arbitrator O. B. Shime observed in *McMaster University and McMaster University Faculty Assn., Re* (1990), 13 L.A.C. (4th) 199, at p. 204:

> Arbitrator/selectors have always maintained an independence from government policies in public sector wage determinations and have never adopted positions which would in effect make them agents of the government for the purpose of imposing government policy.

121 In the case of tribunals established, as here, to adjudicate "interest" disputes between parties, it is particularly important to insist on clear and unequivocal legislative language before finding a legislative intent to oust the requirement of impartiality either expressly or by necessary implication.

122 In this case, however, the legislature's choice of the Minister as the proper authority to exercise the power of appointment is clear and unequivocal.

123 The unions contend that the Minister could have avoided the appearance of a conflict of interest. Over the years, the direct involvement of Ministers in s. 6(5) appointments was somewhat diminished by delegation of the selection of the third arbitrator to a senior public servant, whose recommendation was then, in most cases, accepted by the Minister. An express power of delegation is found in s. 9.2(1), but it is expressed as permissive, not mandatory. The practice of delegation, where followed, may have had as much to do with departmental efficiency as with sensitivity over the Minister's direct involvement. It was not a requirement.

124 In some provinces, the selection of a chairperson in public sector labour disputes is distanced from the Minister by being conferred on a Chief Justice or other disinterested authority. See, e.g., *Universities Act*, R.S.A. 2000, c. U-3, s. 32(*e*); *Teachers' Collective Bargaining Act*, R.S.N. 1990,

c. T-3, ss. 17(2) and 22(2); and *Teachers' Collective Bargaining Act*, R.S.N.S. 1989, c. 460, s. 26(2). This was clearly not an option that recommended itself to the Ontario legislature in the case of the *HLDAA*.

125 Even in 1965, when the *HLDAA* was enacted, provincial funding of health care was such that it was anticipated by opposition members of the legislature that Ministers of Labour would be interested (or would at least have the appearance of an interest) in outcomes as well as process. The legislature nevertheless proceeded to confer the power, perhaps to keep the Minister politically accountable for its exercise. For the court to require the Minister to delegate the choice to an official in his Ministry in the face of the text of s. 6(5) would amount, I think, to a judicial amendment of the legislation.

126 I therefore conclude that the Minister's perceived interest in the outcome of s. 6(5) arbitrations does not bar him from exercising a statutory power of appointment conferred on him in clear and unequivocal language.

(b) *The Minister's Alleged Failure to Consult with the Unions About the Change in the Process of Appointments*

127 The unions claim that they were the beneficiaries of a long-standing appointments process that was regarded by the parties as entrenched and was unfairly changed "in one fell swoop" to the unions' detriment without notice or consultation. If established, such circumstance might well give rise to a claim of breach of procedural fairness. As stated by Le Dain J. in *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, at p. 653:

> This Court has affirmed that there is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual. . . .

128 The issue here is consultation. The unions say that when the Minister changed an entrenched appointments process, his decision was of an administrative nature and affected the vital interest of union members, namely the earning of their livelihood. Their interest was not remote, but

directly engaged by the selection of those to be put in power over the terms of their collective agreement. They consider the situation to be comparable to the facts in *Council of Civil Service Unions v. Minister for the Civil Service*, [1985] A.C. 374 (H.L.).

129 Assuming the existence of a duty to consult in these circumstances, I think it was satisfied. All parties agree that there were extensive meetings at the time of Bill 136. Discussions were intense, sometimes strident, and at the highest levels. Both the Minister of Labour and the Deputy Minister signalled that the appointments process was subject to "reform" and that retired judges were potential candidates for s. 6(5) appointments. The unions made clear their opposition to anything short of a system based on mutual agreement. There was thus some notice of the proposed change and an opportunity to comment. I do not think, as a matter of general legal principle, that s. 6(5) imposed on the Minister a procedural requirement to consult with the parties to each arbitration from and after the general consultations in the fall of 1997. There was no history of such consultation in the past. As CUPE's witness Julie Davis testified:

> Q. And I take it there that it was understood that it would not be necessary to consult first before appointing someone like Adams or Gold who was not on the list, so long as they had this expertise and wide acceptability?
>
> A. That they could be appointed, yes. We didn't dispute people of that calibre; that's true.

130 It is evident from the cross-examinations filed in this case that the choice of hospital arbitrators was one of the flashpoints of the confrontation from June 1997 to February 1998 and continued to be so after the initial set of appointments of retired judges. The unions did not achieve their objective but they had no difficulty in making themselves heard. There was, with respect to the "changed process", no refusal of consultation.

(c) *The Alleged Violation of the Doctrine of Legitimate Expectation in Refusing to Nominate Only Arbitrators Who Had Been Mutually Agreed Upon*

131 The doctrine of legitimate expectation is "an extension of the rules of natural justice and

procedural fairness": *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, at p. 557. It looks to the conduct of a Minister or other public authority in the exercise of a discretionary power including established practices, conduct or representations that can be characterized as clear, unambiguous and unqualified, that has induced in the complainants (here the unions) a reasonable expectation that they will retain a benefit or be consulted before a contrary decision is taken. To be "legitimate", such expectations must not conflict with a statutory duty. See: *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170; *Baker*, *supra*; *Mount Sinai*, *supra*, at para. 29; Brown and Evans, *supra*, at para. 7:2431. Where the conditions for its application are satisfied, the Court may grant appropriate procedural remedies to respond to the "legitimate" expectation.

132 The Court of Appeal concluded, at para. 105, that "the Minister interfered with the legitimate expectations of the appellants and other affected unions, contrary to the principles and requirements of fairness and natural justice" and ordered the Minister to restrict his appointments to the s. 49(10) roster.

133 In my view, with respect, the conditions precedent to the application of the doctrine are not established in this case. The evidence of past practice is equivocal, and as a result the evidence of a promise to "return to" past practice is also equivocal. What Minister Elizabeth Witmer meant by "a return to the sector-based system of appointing arbitrators" (Standing Committee on Resources Development, *supra*, at p. R-2577), and what she was understood by the unions to mean, depends on what they now say were their respective prior understandings of "the system". The Minister says the "sector-based system" was the *HLDAA*, including the broad latitude afforded to him by s. 6(5). The unions say the "sector-based system" was the s. 49(10) roster.

134 The evidence shows, I think, that the "system" varied, both from Minister to Minister, and during the tenure of particular Ministers. Between 1982 and 1997 (considered by both parties to be the relevant period), the appointments of *HLDAA* chairpersons from the s. 49(10) list dropped from 100 percent in 1982/83 to a low of 66 percent in 1985/86 (and 66 percent again in 1986/87). The Deputy Minister testified that "in [1986/87], there were 58 ministerial appointments and of those 19 of the appointees were not on the list and in [1987/88], there were 80 ministerial appointments and 26 were not on the list" (emphasis added). The use of the s. 49(10) roster rose to 98 percent in 1996/97 before dropping back to 90 percent in 1997/98. CUPE witness Julie Davis testified that her union gladly accepted chairpersons such as Harry Waisglass and Ray Illing who were not on the s. 49(10) list:

> So we wouldn't have even questioned their appointment, whether they were on the list or not on the list, because we know them to be, as I said, well-respected people who understand workplace issues and labour relations — in a labour relations context and had high credibility in terms of being able to work with workplace parties.

135 As previously noted, there is no mention in the *HLDAA* of s. 49(10) even though numerous other sections of the *Labour Relations Act, 1995* are explicitly referenced. Whether or not successive Ministers or their delegates limited themselves to the list seems to have been a matter of policy and individual preference. I agree that the evidence shows frequent resort of successive Ministers to the s. 49(10) list, but it equally shows considerable variation, which suggests that successive Ministers did not consider such resort to be obligatory. Moreover, as stated, not everyone on the s. 49(10) list, which was addressed primarily to "grievance" arbitrators, was thought by the parties to be suitable for "interest arbitrations". CUPE's witness, Julie Davis, in her reply affidavit, affirmed that "we were concerned that the Ministry might appoint arbitrators from the roster who have little or no experience in mediation". There thus appears to be no compelling basis in the evidence to restrict the *HLDAA* to the roster of candidates compiled under s. 49(10) of the *Labour Relations Act, 1995*.

136 The evidentiary basis of the unions' contention that chairpersons were to be selected on the basis of mutual agreement is their contention that the Minister made routine resort to the s. 49(10) roster in which the unions had a voice through LMAC. If, as I have concluded, the s. 49(10) argument does not succeed on the facts, the unions' related argument that appointments were subject to mutual acceptability falls with it. For reasons already discussed, I believe that s. 6(5) contemplates the appointment of chairpersons broadly acceptable to labour and management, but that is different from the veto claimed by the unions on a case-by-case basis.

137 The evidence of an alleged promise to return to the *status quo* was equivocal. In her press release dated September 18, 1997, announcing the government's retreat on Bill 136, the Minister stated:

> The union movement has requested a return to the current legislative provision governing the appointment of arbitrators. Our amendments would do that. [Emphasis added.]

138 On September 23, 1997, the Minister told the legislative Standing Committee:

> After a very productive and lengthy consultation, the government has decided it will not proceed with establishing a dispute resolution commission to conduct interest arbitration in the police, fire and hospital sectors. Instead, the government is proposing a return to the sector-based system of appointing arbitrators to resolve disputes in these three particular areas and reforming the existing arbitration systems as they are set out in the Fire Protection and Prevention Act, the Police Services Act and the Hospital Labour Disputes Arbitration

> Act. [Emphasis added.]
>
> (Standing Committee on Resources Development, *supra*, at p. R-2577)

At least to some extent, the Minister gave with one hand (a "return" to the "sector-based system" instead of a Dispute Resolution Commission) what she took away with the other (the existing system would be "reformed").

139 With respect to meetings between the unions and government representatives at the time of Bill 136, the Deputy Minister of Labour testified:

> Union representatives expressed concern at the lack of any assurances about how the appointments would be made. A lengthy and heated discussion took place about this issue. I recall the following exchange between Howard Goldblatt (speaking for the union representatives) and John Lewis and me (speaking for government representatives):
>
> Q: Will you seek our agreement before adding anyone to the pool?
>
> A: No.
>
> Q: Will you consult with us before adding someone to the pool?
>
> A: No.
>
> Q: Let's determine the list of arbitrators right now.
>
> A: No.

140 In her June 5, 1997 press interview, then Minister Witmer had indicated that academics and judges might be used to staff the dispute resolution commission (*The Record*, Kitchener-Waterloo, June 5, 1997, p. B5).

141 The Deputy Minister further testified that in his meetings with union representatives on September 20, 1997, he

> expressly stated that union representatives would see some new faces whom they had not seen before. I indicated that my personal best guess was that there would not be many such people, but that union representatives should expect such appointments.

Two possible "new faces" expressly mentioned were George Adams and Alan Gold, both of whom are retired judges.

142 The unions rely on an alleged "understanding" which was described in a letter to the Minister dated March 10, 1998 from Wayne Samuelson, President of the OFL:

> The understanding between labour and government [in the discussions about Bill 136] was that the government would not add to the existing roster of accepted and experienced labour arbitrators without consultation, and would appoint interest arbitrators only from those on the list of arbitrators who had conducted interest arbitrations in the past, unless the appointment was of an individual who had broad experience as an interest arbitrator and enjoyed wide acceptability in the labour relations community. [Emphasis added.]

143 Apart from whether or not there was such a roster, the importance of this statement by the unions, speaking through the OFL, is that it would be quite acceptable to appoint "an individual who had broad experience as an interest arbitrator and enjoyed wide acceptability in the labour relations community" apparently regardless of whether such an individual was on the s. 49(10) list or any other "list".

144 On April 6, 1998, Mr. Samuelson of the OFL again wrote to the Minister basing his complaint on the Minister's statement that:

> The police and hospital sectors will continue under existing systems for appointment of arbitrators.

According to Mr. Samuelson:

> This is as explicit and precise a statement as anyone could have hoped for. Indeed, this is precisely the point raised at our meeting with you at the OFL offices on March 10, 1998, and repeated in my letter to you of the same date, namely, that the understanding between labour and government was that the government would appoint interest arbitrators only from those on the list of arbitrators who had conducted interest arbitrations in the past.

This resurrects the s. 49(10) roster argument. Mr. Samuelson continued:

> We further understood that should the government find it necessary to add further names to the existing roster of accepted and experienced labour arbitrators, it would only appoint persons with broad experience as an arbitrator. Should this latter case be necessary, it was agreed that the government would engage in genuine consultations on the matter.

145 Mr. Samuelson undoubtedly felt betrayed by the turn of events and attempted to make the best of a difficult situation. The evidence in support of the various agreements and "understandings" he alleges is not clear and it is certainly not unqualified or unambiguous. To bind the exercise of the Minister's discretion the evidence of the promise or undertaking by the Minister or on his behalf must generally be such as, in a private law context, would be sufficiently certain and precise as to give rise to a claim for breach of contract or estoppel by representation: *In re Preston*, [1985] A.C. 835 (H.L.), at p. 866, *per* Lord Templeman.

146 In my view, the evidence does not establish a firm "practice" in the past of appointing from a *HLDAA* list, or from the s. 49(10) list, or proceeding by way of "mutual agreement". A general promise "to continue under the existing system" where the reference to the system itself is ambiguous, and in any event was stated by the Minister to be subject to reform, cannot bind the Minister's exercise of his or her s. 6(5) discretion as urged by the unions under the doctrine of legitimate expectation.

147 I therefore turn to the attack on the appointments as such and, as a necessary preliminary step, the determination of the appropriate standard of review.

(3) The Standard of Review of the Minister's Appointments

148 The Court's response to the unions' challenge to the Minister's appointments will be conditioned in part on the answer to the *Bibeault* question:

> Did the legislator intend [*these* appointments] to be within the jurisdiction conferred on the [Minister]?
>
> (*Bibeault*, *supra*, at p. 1087; see also *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890, at para. 16.)

149 To put the *Bibeault* question in its proper perspective, the courts have enlarged the inquiry beyond the specific formula of words conferring the statutory power. This "pragmatic and functional" approach to ascertain the legislative intent requires an assessment and balancing of relevant factors, including (1) whether the legislation that confers the power contains a privative clause; (2) the relative expertise as between the court and the statutory decision maker; (3) the purpose of the particular provision and the legislation as a whole; and (4) the nature of the question before the decision maker: see *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982; *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1, at para. 30; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19, at para. 26; and *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20, at para. 27. The examination of these four factors, and the

"weighing up" of contextual elements to identify the appropriate standard of review, is not a mechanical exercise. Given the immense range of discretionary decision makers and administrative bodies, the test is necessarily flexible, and proceeds by principled analysis rather than categories, seeking the polar star of legislative intent.

150 The Court has also affirmed that the "pragmatic and functional approach" applies to the judicial review not only of administrative tribunals but of decisions of Ministers: *Baker*, *supra*; *Mount Sinai*, *supra*, at para. 54; *Dr. Q*, *supra*, at para. 21; *Ryan*, *supra*, at para. 21.

151 I would affirm at the outset that the precise wording of the power of appointment of "a person who is, in the opinion of the Minister, qualified to act" (s. 6(5)) is a strong legislative signal, coupled with the privative clause (s. 7), that the Minister is to be afforded a broad latitude in making his selection.

152 The Minister, with the assistance of his officials, knows more about labour relations and its practitioners (including potential arbitrators) than do the courts. The question before him was one of selection amongst candidates he regarded as qualified. These factors call for considerable deference. The Minister says his appointments should be upheld unless they can be shown to be patently unreasonable. As was said in *Mount Sinai*, *supra*, in the concurring reasons, at para. 58:

> Decisions of Ministers of the Crown in the exercise of discretionary powers in the administrative context should generally receive the highest standard of deference, namely patent unreasonableness. This case shows why. The broad regulatory purpose of the ministerial permit is to regulate the provision of health services "in the public interest". This favours a high degree of deference, as does the expertise of the Minister and his advisors, not to mention the position of the Minister in the upper echelon of decision makers under statutory and prerogative powers. The exercise of the power turns on the Minister's appreciation of the public interest, which is a function of public policy in its fullest sense.

153 Against the strong pull of these factors towards the highest degree of deference, the unions stake their case on the purpose of s. 6(5) and the *HLDAA* as a whole. In the weighing-up exercise, they say, the clearest guidance in this case to legislative intent is to focus on the job s. 6(5) was designed to do. The legal context is different from *Mount Sinai*. The Minister is not promulgating broad policy. He is asked to make an appointment which the parties, had they been able to agree, could have made for themselves. The specialized purpose of the *HLDAA* — to provide an adequate substitution for strikes and lockouts, and thereby to achieve industrial peace — provides a relatively narrow context, say the unions, within which the words of s. 6(5) must be understood. In this respect, they point to the standard

of reasonableness *simpliciter* adopted in *Baker*, *supra*, at para. 62.

154 I accept the unions' distinction between this case and *Mount Sinai*, but a ministerial discretion need not be wide open to attract the protection of the patent unreasonableness standard. On the other hand, *Baker* was an unusual case because the decision was effectively delegated to lower ranking officials whose discretion was itself circumscribed in some detail by ministerial guidelines (paras. 13-17); see *Suresh*, *supra*, at paras. 36-37. It thus provides little authority for withholding the highest standard of deference from appointments that were clearly and unequivocally made by the Minister of Labour himself.

155 Nor is the Court's recent decision in *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, 2002 SCC 11, of particular assistance to the unions. In that case, this Court, *per* Arbour J., reviewed "the interpretation given by the [Judicial] Council to the scope of its mandate based on its interpretation of s. 6.11(4) of its enabling statute" according to the reasonableness *simpliciter* standard of review (para. 67). That having been done, however, Arbour J. moved to the "ultimate decision of the Council to recommend the removal", which she characterized as a question of mixed law and fact, and determined that the appropriate standard of review in *that* respect was patent unreasonableness (paras. 68-69). In that case, the decision maker's interpretation of its enabling statute had emerged as a distinct issue before all levels of court, and it was convenient to deal with the legal determination and the ultimate decision separately. Here, these issues are bundled.

156 This does not mean, however, that the limited nature of the Minister's mandate under s. 6 (5) will be overlooked in the application of a patent unreasonableness standard. It must be an important factor, in this context, in assessing the reasonableness of his s. 6(5) appointments. As was pointed out in *Canadian Broadcasting Corp.*, *supra*, *per* Iacobucci J., at para. 49:

> While the Board may have to be correct in an isolated interpretation of external legislation, the standard of review of the decision as a whole, if that decision is otherwise within its jurisdiction, will be one of patent unreasonableness. Of course, the correctness of the interpretation of the external statute may affect the overall reasonableness of the decision. Whether this is the case will depend on the impact of the statutory provision on the outcome of the decision as a whole.

In that case a CBC journalist, who was also president of the union representing CBC writers and performers, wrote an anti-free trade article in the union newspaper during the 1988 federal "free trade" election campaign. The CBC claimed that this publication was an act of partisan politics which

compromised CBC journalistic ethics. The CBC forced him to choose between on-air journalism and the presidency of the union. He chose journalism. The union complained about the CBC's conduct to the Canada Labour Relations Board. In assessing the union's complaint, the Board was required to consider the CBC's mandate set out in the *Broadcasting Act* (an "external" statute). On an application for judicial review to the Federal Court of Appeal, the Board's interpretation of the *Broadcasting Act* was an issue bound up with its determination of an unfair labour practice under s. 94(1)(*a*) of the *Canada Labour Code* (the Board's "enabling" statute). The Court treated the first issue as input to the second issue, which was in fact the decision sought to be judicially reviewed.

157 I conclude, therefore, that the answer to the *Bibeault* question in this case is that the legislature intended the Minister's s. 6(5) appointments to prevail unless his selection is shown to be patently unreasonable.

(4) When Does a Decision Rise to the Level of Patent Unreasonableness?

158 On what basis can the Minister's appointments be said not only to depart from a reasonableness standard, but to fail even the most deferential standard of *patent* unreasonableness?

159 In *Southam*, *supra*, Iacobucci J. described, at para. 57, how reasonableness *simpliciter* differs from patent unreasonableness:

> The difference between "unreasonable" and "patently unreasonable" lies in the immediacy or obviousness of the defect. If the defect is apparent on the face of the tribunal's reasons, then the tribunal's decision is patently unreasonable. But if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable. As Cory J. observed in *Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941, at p. 963, "[i]n the Shorter Oxford English Dictionary 'patently', an adverb, is defined as 'openly, evidently, clearly'". This is not to say, of course, that judges reviewing a decision on the standard of patent unreasonableness may not examine the record. If the decision under review is sufficiently difficult, then perhaps a great deal of reading and thinking will be required before the judge will be able to grasp the dimensions of the problem. . . . But once the lines of the problem have come into focus, if the decision is patently unreasonable, then the unreasonableness will be evident.

160 The Court recently returned to the distinction between reasonableness *simpliciter* and patent unreasonableness in *Ryan*, at para. 52:

> In *Southam*, *supra*, at para. 57, the Court described the difference between an unreasonable decision and a patently unreasonable one as rooted "in the immediacy or obviousness of the defect". Another way to say this is that a patently unreasonable defect, once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective. . . . A decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand.

161 The term "patent unreasonableness" predates *Bibeault* (1988), and the birth of the pragmatic and functional approach: see *Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Association*, [1975] 1 S.C.R. 382, and *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227. It was intended to identify a highly deferential standard of review to protect administrative decision makers from excessive judicial intervention. In that sense, it was incorporated as the most deferential standard in the subsequent case law: see, e.g., *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324; *Baker*, *supra*, at para. 56, and *Suresh*, *supra*, at para. 29. Patent unreasonableness simply identifies the point where, as stated in *Ryan*, *supra*, "no amount of curial deference can justify letting [the decision] stand" (para. 52).

162 When reviewing a decision on the less deferential reasonableness *simpliciter* standard, judges may obviously have to let stand what they perceive to be an incorrect decision.

163 If we could conclude on this record that different Ministers of Labour, acting reasonably, could have come to different conclusions about the need for expertise and general acceptability in the labour relations community to chair *HLDAA* boards, and that this Minister's approach was within such a range of reasonable opinions, we would be guided by the legislative intent, as assessed under the pragmatic and functional test, to defer to his choices.

164 However, applying the more deferential patent unreasonableness standard, a judge should intervene if persuaded that there is no room for reasonable disagreement as to the decision maker's failure to comply with the legislative intent. In a sense, like the correctness standard, the patently unreasonable standard admits only one answer. A correctness approach means that there is only one proper answer. A patently unreasonable one means that there could have been many appropriate answers, but not the one reached by the decision maker.

165 A patently unreasonable appointment, then, is one whose defect is "immedia[te] or obviou [s]" (*Southam*, *supra*, at para. 57), and so flawed in terms of implementing the legislative intent that no amount of curial deference can properly justify letting it stand (*Ryan*, *supra*, at para. 52).

(5) Were the Minister's Appointments Challenged in This Case Patently Unreasonable?

166 Under this heading, I group the unions' two-pronged attack on the substance of the Minister's appointments, namely (a) that he did not restrict himself to the list of arbitrators established under s. 49(10) of the *Labour Relations Act, 1995*, and (b) that he rejected labour relations expertise and broad acceptability within the labour relations community as criteria for selection of chairpersons.

(a) *The Minister Did Not Restrict His Selections to the Section 49(10) List*

167 The Court of Appeal prohibited the Minister making s. 6(5) appointments "unless such appointments are made from the long-standing and established roster of experienced labour relations arbitrators" (para. 105). It seems the court was referring to the s. 49(10) list.

168 In a preceding discussion, I concluded that the Minister was not required, by reason of the doctrine of legitimate expectation, to limit his appointments to the s. 49(10) list, but the question at this later stage is whether it was patently unreasonable of him, as a matter of law, not to do so.

169 The principal CUPE witness, Julie Davis, in cross-examination, conceded that some of the arbitrators who are in fact on the s. 49(10) list were unacceptable to her union. The witness for the respondent Service Employees International Union, Marcelle Goldenberg, went even further in her affidavit:

> It is my understanding that a significant number of all arbitrators on the [s. 49(10)] roster (including both those who were required to complete the Arbitrator Development Program and those who were placed directly on the roster) fail to meet the criteria of acceptability at their first review [four years after appointment] and are purged from the list.

Just as being on the s. 49(10) list is no guarantee of acceptability, so the unions' acceptance of non-s. 49 (10) candidates, including Professor Weiler and Ray Illing, confirm the reasonableness of the Minister's view that candidates can qualify for s. 6(5) appointments without being on the s. 49(10) list.

170 The unions, speaking through the OFL, said that they would be satisfied with any individual "who had broad experience as an interest arbitrator and enjoyed wide acceptability in the labour relations community" (see para. 142 above). It would not be at all unreasonable for the Minister to adopt the same position. The Minister, accordingly, cannot be faulted for refusing to limit his selection to the s. 49(10) roster.

(b) *Rejecting the Criteria of "Labour Relations Expertise and Broad Acceptability Within the Labour Relations Community"*

171 Earlier in these reasons, I referred to Justice Rand's *dictum* in *Roncarelli* that the exercise of a discretion "is to be based upon a weighing of considerations pertinent to the object of the [statute's] administration" (p. 140). I propose briefly to supplement that *dictum* by reference to our more recent case law, then consider it in relation to the test for "patent unreasonableness" on the facts of this case.

(i) Exclusion from Consideration of Relevant Criteria

172 The principle that a statutory decision maker is required to take into consideration relevant criteria, as well as to exclude from consideration irrelevant criteria, has been reaffirmed on numerous occasions. In *Oakwood Development Ltd. v. Rural Municipality of St. François Xavier*, [1985] 2 S.C.R. 164, the issue was whether a municipal Council erred in refusing to consider an application for the subdivision of some land prone to flooding. Although the Council had considered that fact, it failed to consider the severity of those floods and excluded consideration of any possible solutions to the problem. Wilson J. stated, at pp. 174-75:

> More specifically, was [the Council] entitled to consider the potential flooding problem and make it the ground of its decision to refuse approval of the subdivision? As Rand J. said in *Roncarelli v. Duplessis*, [1959] S.C.R. 121, at p. 140, any discretionary administrative

> decision must "be based upon a weighing of considerations pertinent to the object of the administration". For the reasons already given I am of the view that the Council was entitled to take the flooding problem into consideration. The issue does not, however, end there. As Lord Denning pointed out in *Baldwin & Francis Ltd. v. Patents Appeal Tribunal*, [1959] A.C. 663, at p. 693, the failure of an administrative decision-maker to take into account a highly relevant consideration is just as erroneous as the improper importation of an extraneous consideration. . . . The respondent municipality, therefore, must be seen not only to have restricted its gaze to factors within its statutory mandate but must also be seen to have turned its mind to all the factors relevant to the proper fulfilment of its statutory decision-making function.

173 Again, in *Reference re Bill 30, an Act to amend the Education Act (Ont.)*, [1987] 1 S.C.R. 1148, at p. 1191, Wilson J. noted:

> It is, however, well established today that a statutory power to make regulations is not unfettered. It is constrained by the policies and objectives inherent in the enabling statute. A power to regulate is not a power to prohibit. It cannot be used to frustrate the very legislative scheme under which the power is conferred.

174 In my view, as will be seen, the appointment of retired judges as a class to chair *HLDAA* arbitration boards had the effect of frustrating "the very legislative scheme under which the power is conferred". See also *Baker*, *supra*, at para. 73.

175 More recently, in *Suresh*, at paras. 37-38, the Court restated this basic principle of administrative law:

> *Baker* does not authorize courts reviewing decisions on the discretionary end of the spectrum to engage in a new weighing process, but draws on an established line of cases concerning the failure of ministerial delegates to consider and weigh implied limitations and/or patently relevant factors. . . .
>
> . . . The court's task, if called upon to review the Minister's decision, is to determine whether the Minister has exercised her decision-making power within the constraints

> imposed by Parliament's legislation and the Constitution. If the Minister has considered the appropriate factors in conformity with these constraints, the court must uphold his decision. It cannot set it aside even if it would have weighed the factors differently and arrived at a different conclusion. [Emphasis added.]

176 In applying the *patent* unreasonableness test, we are not to reweigh the factors. But we are entitled to have regard to the importance of the factors that have been excluded altogether from consideration. Not every relevant factor excluded by the Minister from his consideration will be fatal under the patent unreasonableness standard. The problem here, as stated, is that the Minister expressly excluded factors that were not only relevant but went straight to the heart of the *HLDAA* legislative scheme.

(ii) Application of These Principles to the Facts of This Case

177 The task before the arbitration boards was not to apply existing collective agreements to a fact situation (as in a grievance arbitration) but to write the essential and most controversial terms of the collective agreement itself. The need for labour relations expertise, independence and impartiality, reflected in broad acceptability, has been a constant refrain of successive Ministers of Labour to the Ontario legislature since the *HLDAA* was introduced in 1965, and its various amendments thereafter.

178 I do not impute to the Minister a knowledge of the *HLDAA*'s legislative history. He himself aptly summarized the legislative intent when he wrote on February 2, 1998 that "the parties must perceive the [*HLDAA*] system as neutral and credible" (emphasis added).

179 His reading of the legislative intent is reinforced by the evidence of practice and experience in the labour relations field. I accept, as did the Court of Appeal, the testimony in this respect of Professor Joseph Weiler, whose affidavit was filed on behalf of the unions (at para. 36):

> The independence and impartiality of arbitrators is guaranteed not by their remoteness, security of tenure, financial security or administrative security, but by training, experience and mutual acceptability. [Emphasis added.]

180 I agree too with the observation of the Ontario Court of Appeal in this case that the matters before a *HLDAA* "interest" arbitration were "not essentially legal but practical and require the familiarity and expertise of a labour arbitrator rather than the skills of a lawyer or a judge" (para. 75).

181 Given the role and function of the *HLDAA*, as confirmed by its legislative history, we look in vain for some indication in the record that the Minister was alive to these labour relations requirements.

182 Instead, there is an active disclaimer of any such requirement, by the Minister's senior advisor charged with the search for retired judges, who made clear in his cross-examination the Minister's rejection of both expertise and broad acceptability as qualifications:

> Q. And you didn't ask about any experience in the health care field?
>
> A. No. This was not about finding people who had any past experience, relationships or — we weren't trying to come through to find people who would understand —
>
> Q. Anything to do with the health field?
>
> A. The health field or the labour field through some past involvement.
>
> We were looking for neutral decision makers to provide mediation and arbitration.

183 I accept as correct the Minister's February 2, 1998 statement that the *HLDAA* process must be "perceive[d] . . . as neutral and credible". I also accept that neutrality, and the perception of neutrality, is bound up with an arbitrator's "training, experience and mutual acceptability" (as Professor Weiler testified). I conclude as well that the Minister's approach was antithetical to credibility because he excluded key criteria (labour relations expertise and broad acceptability) and substituted another criterion (prior judicial experience) which, while relevant, was not sufficient to comply with his

legislative mandate even as he, in his February 2, 1998 letter, defined his mandate.

184 Speaking broadly, "the perspective" within which the *HLDAA* was intended by the legislature to operate (*Roncarelli*, at p. 140) is to secure industrial peace in hospitals and nursing homes. The *HLDAA* imposes a compulsory yet mutually tolerable procedure (if properly administered) to resolve the differences between employers and employees without disrupting patient care. In that context, appointment of an inexpert and inexperienced chairperson who is not seen as broadly acceptable in the labour relations community is a defect in approach that is both immediate and obvious. In my view, with respect, having regard to what I believe to be the legislative intent manifested in the *HLDAA*, the Minister's approach to the s. 6(5) appointments was patently unreasonable.

185 This is not to say that specific s. 6(5) appointees of the Minister do not also possess labour relations expertise and broad acceptability, coincidentally as it were, despite the Minister's documented lack of interest in these qualifications. We would properly exercise our discretion to decline to interfere, as did the Court of Appeal, with such (coincidentally) appropriate appointments. Thus the qualifications of specific s. 6(5) appointees will, if challenged, have to be assessed on a case-by-case basis. I will discuss this point further when I come to the issue of remedy.

(6) Did the Court of Appeal Err in Finding that the Arbitration Boards, By Reason of the Impugned Ministerial Approach to Section 6(5) Appointments, Lacked the Requisite Institutional Independence and Impartiality?

186 Having determined that the Minister's approach to the s. 6(5) appointments was patently unreasonable on other grounds, it is not, strictly speaking, necessary to address this further ground of appeal. I do so, however, for two reasons. Firstly, it is on this ground that the Court of Appeal granted the following declaration:

> 1. THIS COURT DECLARES that the Minister created a reasonable apprehension of bias and interfered with the independence and impartiality of boards of arbitration established under the *Hospital Labour Disputes Arbitration Act*, R.S.O. 1990, c. H.14 ("*HLDAA*"), contrary to the principles and requirement of fairness and natural justice.

187 Secondly, as will be seen when I address the issue of remedy, I propose to leave open (as did the Court of Appeal) the possibility of specific challenges by the parties to particular s. 6(5) appointments on a case-by-case basis. I would not want our Court's silence on this ground of attack, in light of its acceptance by the Court of Appeal, to encourage (or prolong) further litigation on this point. The parties have fought the issue of the independence and impartiality of the resulting arbitration boards, which is an objection generic to all of the impugned s. 6(5) appointments, for almost four years. Now that the issue has arrived at this Court, where it was fully argued, we should, I think, provide as much help as we can to assist the parties to resolve their outstanding differences without prolonging the delay and expense.

188 The unions contend that the appointment of retired judges created arbitration boards that were neither impartial nor independent of the Minister, and that s. 6(5) did not authorize appointments that resulted in a tribunal that failed to meet the minimum standards of natural justice.

189 It is now clear that the independence as well as the impartiality of the decision maker is a component of natural justice: *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282, at p. 332, *per* Gonthier J.; *Matsqui Indian Band*, *supra*, at para. 79, *per* Lamer C.J.; and *R. v. Généreux*, [1992] 1 S.C.R. 259, at pp. 283-84. As the purpose of the independence requirement is to establish a protected platform for impartial decision making, I will deal first with this objection.

(a) *Institutional Independence*

190 The *HLDAA* commands the use of *ad hoc* arbitration boards. The unions argue that such boards, in the context of "interest arbitrators", are flawed because they lack the usual indices of institutional independence such as security of tenure, financial security and administrative independence that rest on "objective conditions or guarantees": *Valente v. The Queen*, [1985] 2 S.C.R. 673, at p. 689, and *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, at para. 115. However, as explained above, the Court cannot substitute a different tribunal for the one designed by the legislature. An *ad hoc* tribunal is by definition constituted on a case-by-case basis. Security of tenure does not survive the termination of the arbitration, and financial security is similarly circumscribed. Administrative independence has little formal protection. Professional labour arbitrators (including those on the s. 49(10) list) function successfully in such a structure even though there may be no guarantee of continuing work from any particular employer or union.

191 In addition to the *HLDAA*'s statutory command, the Court's assessment of structural independence should take into account the success with which *ad hoc* tribunals have long operated in labour relations in general and under the *HLDAA*'s scheme of compulsory arbitrations (prior to the appointments in question) in particular: *Katz v. Vancouver Stock Exchange*, [1996] 3 S.C.R. 405, at

para. 1. In this regard, as mentioned, Professor Joseph Weiler testified that: "The independence and impartiality of arbitrators is guaranteed not by their remoteness, security of tenure, financial security or administrative security but by training, experience and mutual acceptability".

192 Accepting Professor Weiler's evidence on this point, it follows that if, as I have concluded, s. 6(5) requires the appointment of individuals as chairpersons who are qualified by training, experience and mutual acceptability, the proper exercise of the appointment power would lead to a tribunal which, in the context of labour relations, would satisfy reasonable concerns about institutional independence.

193 Accordingly, having regard both to general labour relations experience, as well as the explicit legislative provisions in the *HLDAA*, I would not give effect to the unions' generic objection directed to the issue of institutional independence. If additional facts are raised on a case-by-case challenge, they will have to be addressed at that time.

(b) *Impartiality*

194 Impartiality, on the other hand, raises different considerations. The *HLDAA* did not command the appointment of retired judges. Nor does the *HLDAA* contemplate biased arbitrators.

195 The test for institutional impartiality is whether a well-informed person, viewing the matter realistically and practically and having thought the matter through, could form a reasonable apprehension of bias in a substantial number of cases (*2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919, at para. 44; *R. v. Lippé*, [1991] 2 S.C.R. 114, at p. 143, and *Matsqui Indian Band*, *supra*, at para. 67).

196 The Minister does not contest the requirement that his s. 6(5) appointees be impartial. He was, as stated, looking for "[p]eople who had spent their professional lives as neutrals".

197 Allegations of individual bias must necessarily be dealt with on a case-by-case basis. I am dealing here only with the general proposition that the Minister's appointment of retired judges to chair *HLDAA* boards did, by the fact of their appointment alone, doom the impartiality of the resulting boards.

198 To be sure, the unions now say that their challenge is not directed so much to the

appointment of retired judges as to the sudden change of appointments process without prior consultation. Nevertheless, they still rely on the evidence of Professor Joseph Weiler who says that judges as a class have historically not been seen to be sympathetic or particularly fair to the cause of labour.

199 "Impartiality" is a state of mind. Some of the cases draw a distinction between an allegation of bias (or prejudice), i.e., that the s. 6(5) appointees come to their task with something less than an open mind, a predisposition for or against one of the parties, or a leaning towards a particular outcome, and an allegation of partiality. The allegation of partiality, according to these cases, takes the attack a significant step further by suggesting that the appointees are not only biased but will allow, either consciously or unconsciously, their biases to influence the decision they will be called on to make: *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, at paras. 105 *et seq.*, *per* Cory J.; *R. v. Williams*, [1998] 1 S.C.R. 1128, at paras. 9-10; *R. v. Parks* (1993), 15 O.R. (3d) 324 (C.A.), at p. 336, leave to appeal refused, [1994] 1 S.C.R. x. The Court of Appeal did not suggest that the retired judges were in fact prejudiced or partial but concluded that they might reasonably be seen to be "inimical to the interests of labour, at least in the eyes of the appellants" (para. 101). I agree with the Minister that the proper test is not so narrowly focussed. The test is not directed to the subjective perspective of one of the parties but to the reasonable detached and informed observer, i.e., "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude": *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, at p. 394.

200 The unions contend that this Court should defer to the Court of Appeal's findings of fact. Reliance is placed on the observation of Gonthier J. that "[t]he principle of non-intervention on questions of fact is also applicable to a second appellate court such as this Court *vis-à-vis* a first appellate court" (*St-Jean v. Mercier*, [2002] 1 S.C.R. 491, 2002 SCC 15, at para. 37). However, we are not thusly inhibited if the Court of Appeal applied the wrong test. The correct viewpoint is that of an informed observer who is detached from a personal interest in the controversy.

201 The fact is that retired judges as a class have no interest in the outcome of hospital collective bargaining disputes beyond that of other citizens. They pay provincial taxes at the same rates and aspire to a reasonable level of health care. They have personal experience of public sector pay restraint. They probably harbour as many different views of public sector wage policy as there are retired judges.

202 There are no "substantial grounds" (*Committee for Justice and Liberty*, *supra*, at p. 395) to think that retired superior court judges, who enjoy a federal pension, would do the bidding of the provincial Minister, or make decisions to please the employers so as to improve the prospect of future appointments. Undoubtedly, there have been some judges predisposed toward management in the past, as well as some judges predisposed toward labour, but I do not think the fully informed, reasonable person would tar the entire class of presently retired judges with the stigma of an anti-labour bias.

203 The unions refute any "class" objection by their ready acceptance of retired judges Alan Gold and George Adams as chairpersons of "interest" arbitrations. The potential problem with some retired judges is not partiality but expertise.

204 While I would therefore reject this branch of the unions' challenge, I accept, of course, that a challenge might be made to the impartiality of a particular retired judge to a particular *ad hoc* tribunal, as indeed the impartiality of any other appointee could be questioned on a case-by-case basis.

(7) The Proper Remedy

205 The remedy of the Court of Appeal was predicated on its conclusion that the Minister created a reasonable apprehension of bias and interfered with the independence and impartiality of the *HLDAA* boards of arbitration, as well as the legitimate expectation of the unions contrary to the requirements of natural justice.

206 I have indicated my reasons for respectful disagreement with the scope of that decision, while agreeing with the Court of Appeal's fundamental concern about the Minister's non-compliance with the legislative intent reflected in the *HLDAA* to appoint persons who were not only impartial and independent but possessed expertise and who were generally seen as acceptable to both labour and management in the labour relations community. I also share the Court of Appeal's reluctance, in a judicial review which did not focus on the circumstances of individual appointments, to give effect to the unions' request to set aside the Minister's appointments.

207 It is common ground that some retired judges *do* have the necessary labour relations background (e.g., former judges Gold and Adams) and, of course, the fact they also happen to be members of the "class" of retired judges would not, in their case, be a ground of disqualification.

208 In accordance with these reasons, the appeal should therefore be dismissed, but paragraphs 1, 2 and 3 of the order of the Court of Appeal should be varied to read:

> 1. The Court declares that the Minister is required, in the exercise of his power of appointment under s. 6(5) of the *HLDAA*, to be satisfied that prospective chairpersons are not only independent and impartial but possess appropriate labour relations expertise and are

recognized in the labour relations community as generally acceptable to both management and labour.

2. This order speaks from the date hereof and does not invalidate completed arbitration awards.

3. Any challenges to continuing arbitrations, including those chaired by retired judges appointed by the Minister under s. 6(5) of the *HLDAA*, are subject to judicial review on a case-by-case basis.

V. Conclusion

209 Except as aforesaid, the appeal is dismissed with costs.

Appeal dismissed with costs, MCLACHLIN C.J. *and* MAJOR *and* BASTARACHE JJ. *dissenting.*

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